Supreme Court, U.S.
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No. ——

In The

Supreme Court of the United States

CITY OF AUSTIN, TEXAS,

Petitioner,

vs.

SOUTHWESTERN BELL VIDEO SERVICES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

ANDREW MARTIN
City Attorney
City of Austin
P. O. Box 1088
Austin, Texas 78767-8828
(512) 499-2188
Fax: (512) 499-6490

RENEA HICKS*
LAW OFFICE OF
MAX RENEA HICKS
800 Norwood Tower
114 West Seventh Street
Austin, Texas 78701-3012
(512) 480-8231
Fax: (512) 476-4557
* *Counsel of Record*

Attorneys for Petitioner
City of Austin

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

The dispute is whether cable provider Bell Video must obtain a cable franchise from the City. The resolution depends upon whether the cable provider is a "cable operator" under the Cable Communications Policy Act of 1984, which presents the following questions:

1. What is the requisite level of ownership and control over a cable system that a cable provider must exercise to be a "cable operator" under 47 U.S.C. § 522(5)?

2. Is a cable provider exempt from the municipal franchise requirements of the Cable Communications Policy Act of 1984 if it does not own all the components of the cable system but instead delivers cable service over a system that it owns in part and leases in part?

3. Does resolution of the franchise exemption issue in Question 2 depend on whether the part of the cable system leased by the provider is owned by an "affiliate" of the provider as defined in 47 U.S.C. § 522(2)?

LIST OF PARTIES

Appellant below:

City of Austin, Texas

Appellee below:

Southwestern Bell Video Services, Inc.

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PETITION FOR WRIT OF CERTIORARI

The City of Austin, Texas ("City" or "Austin"), petitions the Court to issue a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 193 F.3d 309 (5th Cir. 1999) and reproduced in the appendix to this petition at App. 1-App. 11. The opinion of the United States District Court for the Western District of Texas, Austin Division, is not reported in the official reporters; it is reproduced at App. 12-App. 32.

JURISDICTION

The opinion of the Fifth Circuit issued on October 14, 1999. App. 1. The Fifth Circuit denied the City's petition for rehearing on November 16, 1999. App. 33. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

The following provisions of the Cable Communications Policy Act of 1984, as amended,[1] 47 U.S.C. §§ 521-614, are involved in this case: 47 U.S.C. §§ 522(2); 522(5); 522(6); 522(7); 522(9); 522(10); 541(b)(1); 541(c); and 571(a). They are lengthy, so they are set out verbatim in the appendix at App. 36-App. 39.

STATEMENT OF THE CASE

Factual background

Southwestern Bell Video Services, Inc. ("Bell Video"), and Southwestern Bell Telephone Company ("Bell Telephone") teamed up to provide a new cable service in Austin. At the time, Time Warner Communications held the only television cable franchise agreement with the City. Others in Austin offered cable television programming but only through facilities located entirely on private property; no cable franchise was required.

Bell Video and Bell Telephone were not strangers to one another. Both were wholly-owned, first-tier subsidiaries of SBC Communications, Inc. ("SBC"), although they shared neither officers nor employees.

Under the cable service arrangement between Bell Video and Bell Telephone, Bell Video leased floor space in Bell Telephone's central office. There, Bell Video located satellite dishes to receive television programming signals,

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[1] The Cable Communications Policy Act of 1984 added Title VI to the Communications Act of 1934.

a tower and antennae to receive local television station programming, and signal processing equipment known as the "headend." Bell Video's equipment received and sorted the various signals into channels and converted them into a digital form transportable over Bell Telephone's equipment. Then, still in Bell Telephone's central office location, Bell Video routed the signals to Bell Telephone's demarcation point.

From its central office, in a process known as supertrunking video service, Bell Telephone then distributed the Bell Video signals across the City – over routes selected by Bell Telephone but leased to Bell Video – to destinations selected by Bell Video, which had located its receiving equipment on the property of private apartment complexes. Bell Video received these signals and sent them as video programming to apartment residents.

While this cable service delivery process did not require the installation or presence of Bell Video cabling (copper wire, fiber optics, and the like) in or under City rights of way, it did require the use of Bell Telephone equipment located in the rights of way. Bell Telephone maintains an extensive network of copper wire and fiber optic lines throughout Austin, much of which is located in or under City rights of way.

Bell Video refused to obtain a cable franchise from the City, arguing that it was exempted from the franchise requirements of the Cable Communications Policy Act of 1984 ("Cable Act"). Under 47 U.S.C. § 541(b)(1), a "cable operator" is prohibited from providing cable service without a franchise. Bell Video's stance is that it was not a "cable operator."

District court proceedings

The City sued in state court for injunctive and declaratory relief and for a determination that Bell Video owed it cable franchise fees beginning from a period ten months before the suit's filing.[2] Bell Video removed the case to federal court on the basis of federal question jurisdiction, 28 U.S.C. § 1331.

The City and Bell Video stipulated to the facts and filed cross-motions for summary judgment. The district court ruled for Bell Video, observing that, "[a]lthough [Bell Video] appears in all functional respects to be a cable operator, . . . this is simply a case where what looks and quacks like a duck is just not a duck." App. 27.

The district court rested its ruling on the so-called "private cable system" exemption of 47 U.S.C. § 522(7)(B). App. 27; App. 32. It read subsection (B) to exclude the cable delivery system at issue from Section 522(7)'s definition of a "cable system," which in turn carved Bell Video from Section 522(5)'s definition of a "cable operator." Section 541(b)(1)'s franchise requirement applies only to a "cable operator," and, since the district court's rationale meant that Bell Video was not a "cable operator," Bell Video was not required to obtain a franchise even though it was providing "cable service."

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[2] The franchise fee dispute remains a live controversy even if, as it has represented, Bell Video has momentarily stopped providing the cable service in Austin. If the City prevails in this case, Bell Video will owe it fees for the time it was in operation but refused to pay franchise fees.

The district court also concluded that, despite the fact that Bell Video and Bell Telephone were affiliates under the "affiliate" definition in 47 U.S.C. § 522(2), *see* App. 30, Bell Video did not have "significant ownership interest or responsibility over the management and operation" of the cable system and, therefore, it was not a "cable operator" under 47 U.S.C. § 522(5). App. 31.

Fifth Circuit ruling and dissent

On appeal, Bell Video conceded that it provided "cable service" within the meaning of 47 U.S.C. § 522(6) and that the system at issue fit the definition of "cable system" in the opening, pre-exclusion part of § 522(7). Nor did Bell Video contest the City's proposition that, aside from the exclusions in § 522(7), it fell within the "cable operator" definitions in § 522(5)(A) and (B). Bell Video instead argued that it fell within two exclusions from the "cable system" definition in § 522(7): the subsection (B) "private cable system" exclusion upon which the district court had rested its ruling; and the subsection (C) exception for common carriers, which the district court had expressly declined to address. App. 31 n.11.

The Fifth Circuit affirmed the district court in a divided 2-1 decision on a ground neither briefed nor argued by Bell Video. App. 6 n.9 ("we dispose of this case on a legal argument [Bell Video] does not assert"). Without reaching the question of whether Bell Video came within the "private cable operator" exemption of Section 522(7), the majority concluded that Bell Video did not meet the Section 522(5) definition of a "cable operator"

because it owned and controlled "only some components" of the cable system at issue and that those components do not constitute a "significant interest" in the cable system, as that phrase is used in subsection (A) of Section 522(5). App. 5.

The dissent viewed the majority holding as contradicting the plain language of 47 U.S.C. § 522(5)(A), which speaks of ownership "directly *or through one or more affiliates.*" (Emphasis added). The majority's rationale meant that, to be a cable operator, Bell Video itself would have to have a significant ownership interest in the cable system, "measured separately from its affiliate's ownership interest." App. 9. The dissent reasoned that the uncontested affiliate relationship between Bell Video and Bell Telephone meant that they "together own all the equipment and network" forming the cable system, which in turn meant that, in combination with its affiliate, Bell Video owned a "significant interest" in the system. Thus, Bell Video would be a "cable operator" under § 522(5)(A), subject to cable franchise requirements unless it could bring itself within an exclusion in § 522(7)(B) or (C).

REASONS FOR GRANTING THE WRIT

I.

THE DEFINITION OF "CABLE OPERATOR" IS BASIC TO THE RULES FOR CABLE FRANCHISING, AND FIRMLY SETTLING THE DEFINITION'S MEANING AT A CRITICAL JUNCTURE IN THE BUILD-OUT OF THE NATION'S CABLE AND TELECOMMUNICATIONS INFRASTRUCTURE IS AN IMPORTANT FEDERAL QUESTION THAT SHOULD NOT BE DEFERRED.

The cable industry, along with the rest of the nation's telecommunications sector, is in the midst of huge upheaval. It is crucial that the industry and municipalities in which they operate have clear franchising rules. Intermittent rearrangement of the wires, cables, and trenches forming the telecommunications infrastructure is not readily accomplished as the legal system struggles toward finding common ground. Infrastructure and franchising decisions are complicated enormously by the absence of clear rules.

Nothing is more central to the system of cable franchising than knowing the answer to the basic question of who is a "cable operator." It shapes cable industry business arrangements and is key to building the necessary infrastructure. Cities must engage in complex negotiations with the industry, hammering out franchising requirements, to whom they will apply, and under what terms.

Thus, settling the issue of who is a cable operator subject to municipal franchising is an important question of federal law. It has been unsettled by the Fifth Circuit ruling, and should be settled definitively by this Court before matters proceed any further. The definitional rule

is basic to an industry and infrastructure dependent on long-range planning; it is crucial to local governments with important responsibilities to the public. It should not be left undecided while lower courts develop varying views on the governing law.

Two major purposes underly the municipal franchising requirements of the Cable Act: fees; and public service. Fees are evident, but the public service aspects of franchising cannot be overlooked, for Congress emphasized that one of the reasons for the franchise rules of the Cable Act was to "assure the cable systems are responsive to the needs and interests of the community." 47 U.S.C. § 521(2).

The Fifth Circuit majority opinion poses a grave danger to municipalities on both fronts of their franchising powers with respect to cable systems. Flying directly in the face of carefully crafted congressional terms, the court of appeals has created a gaping loophole in the Cable Act, threatening wholesale evasion of the payment of municipal franchise fees and of the fulfillment of cable provider responsibilities to the communities where they provide their service. It also has created an uneven playing field. Through artificial corporate transactions designed for no purpose other than taking advantage of the rule the Fifth Circuit has read into the statute, those providing cable service can spin off small components of the cable system to affiliates specially created for that one purpose, deplete the coffers of cities across the country, and substantially reduce the public interest, educational, and governmental programming ("PEG," in cable industry parlance) that comes as an obligation of franchising. More established

cable companies, already subject to franchise agreements, will be left to shoulder all the PEG responsibilities.

Congress has not decreed this diminution of traditional municipal franchising authority. In the course of one short paragraph, the court of appeals has rewritten the statutory definition that is the key to municipal franchising for cable service. The "cable operator" definition in § 522(5) spans all aspects of cable franchising, unlike the important, but narrower, provisions concerning exemptions and exclusions, such as those found in the subsections of § 522(7)'s "cable system" definition. Setting a clear rule for the "cable operator" definition, and staying on the course Congress has marked by statute, are critical to the franchising system. That is why the Court should grant certiorari – to resolve the important, overarching statutory question of what is the core definition of a "cable operator" subject to the requirements of municipal franchising.

II.

THE FIFTH CIRCUIT'S DECISION REMOVES THE PHRASE "OR THROUGH ONE OR MORE AFFILIATES" FROM THE STATUTORY DEFINITION OF "CABLE OPERATOR" IN 47 U.S.C. § 522(5)(A).

The first definition of "cable operator" in the Cable Act is:

> any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system[.]

47 U.S.C. § 522(5). Below, it was either undisputed or assumed: that Bell Video and Bell Telephone were "persons;" that "cable service" was being provided; that it was being provided over a "cable system;"[3] that Bell Video itself did not directly own all of the cable system; and that Bell Video and Bell Telephone were "affiliates."

Thus, the only questions about whether Bell Video fit the "cable operator" definition were whether it either "directly" owned a "significant interest" in the cable system or "through one or more affiliates" owned a "significant interest." This language plainly identifies two ways in which a "significant [ownership] interest" in a cable system can exist. It can exist "directly," or it can exist "through one or more affiliates."

There were only two ownership interests in the cable system at issue in the case: Bell Video's and Bell Telephone's. Together, they owned all the components of the cable system. App. 9 (they "together own all the equipment and network that constitute the cable system"). Furthermore, Bell Telephone was indisputably an affiliate of Bell Video because, in a phrase from 47 U.S.C. § 522(2)'s definition of "affiliate," they were "under common ownership" of SBC.

Their affiliate relationship meant that ownership of the entire cable system was attributable to Bell Video. Bell Telephone's ownership interest is statutorily imputed to Bell Video. Whatever the threshold is for "significant

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[3] Bell Video's effort was to bring itself within the exclusions from the definition of a "cable system." The Fifth Circuit did not reach this issue.

interest" in § 522(5)(A), it clearly is met when the ownership interest is in the whole system. Thus, Bell Video was a "person" providing "cable service" over a "cable system" in which it owned a "significant interest," and, consequently, it was a "cable operator" under subsection (A) of § 522(5). It had no cable franchise and refused to get one. All that being so, Bell Video was a "cable operator" providing "cable service without a franchise" in violation of 47 U.S.C. § 541(b)(1).

The Fifth Circuit's rationale ignores the statutory definition's imputation of ownership through an affiliate. Under the lower court's approach, there is no difference between owning "directly" and owning "through one or more affiliates" because, without saying so, the court imposes the requirement that owning "through one or more affiliates" has the same reach as owning "directly." Thus, the statutorily established concept of owning a cable system "through one or more affiliates" is eliminated from the "cable operator" definition.

The Fifth Circuit suggests that the "ownership through an affiliate" aspect of the "cable operator" definition could mean that SBC, the parent company of Bell Video and Bell Telephone, is a "cable operator" for the system under consideration. App. 6-7 n.9. The problem with this suggestion – which the City agrees means that SBC must obtain a cable franchise if Bell Video does not – is the court's rejection of the proposition that Bell Video's undisputed direct ownership of all components of the cable system except the intermediary distribution channels of Bell Telephone also did not constitute ownership of a "significant interest." App. 5. This conclusion establishes such a high threshold for "significant [ownership]

interest" that it paves the way for ready evasion by SBC and others through spin-offs of ownership interests in components of the system.

Demonstrating that the Fifth Circuit made a mistake in its reading of the Cable Act is not the sole purpose of the foregoing discussion. It also demonstrates how the Fifth Circuit's rationale, and its effective repeal of a key element of the "cable operator" definition, has created both uncertainty about how the franchising rules are to operate at their most basic definitional level and the opportunity for manipulation of cable business structures to evade municipal franchising requirements that Congress had seemingly foreclosed.

It is this latter demonstration, and not simply the City's belief that the Fifth Circuit made a legal mistake, that makes this case an important vehicle for the Court to settle the law on the core Cable Act question of who is a "cable operator." The Court should hear this case and settle the definitional issue before the cable franchising system across the country splinters, with governmental and cable business decisions being made in reaction to the rule of law handed down by the Fifth Circuit.

III.

THE TREATMENT BY OTHER CIRCUITS OF THE "CABLE OPERATOR" DEFINITION IN 47 U.S.C. § 522(5) IS CLOUDED BUT INCONSISTENT WITH THE FIFTH CIRCUIT MAJORITY'S RATIONALE

The Seventh and Eighth Circuits have addressed the "cable operator" definition at issue here. The Seventh

Circuit's holding ultimately did not rest on the meaning of § 522(5); the Eighth Circuit's did. In both instances, however, the judicial treatment of the role of § 522(5)'s "cable operator" definition in resolving franchise issues differed from the Fifth Circuit's. Because this definition is a basic element in deciding the applicability of cable franchise requirements, and because the rules currently are muddled in the courts of appeals, the Court should use this opportunity to clarify the law.

Seventh Circuit: *City of Chicago*

The Seventh Circuit, by a divided 2-1 vote in *City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999), decided a dispute presenting a similar, but not identical, situation to the one presented here.[4] The indefinite, multi-factored rationale of the *City of Chicago* majority opinion on the question presented in this case concerning when a cable provider may be considered a "cable operator" under 47 U.S.C. § 522(5) further highlights the need for this Court to grant certiorari. It is important to settle the matter so the law can be applied even-handedly across the country.

The configuration of the cable delivery system in *City of Chicago* parallels the Bell Video/Bell Telephone arrangement in this case with one important exception: the cable provider (ECI) that owned the head-end system and the apartment complex delivery system was *not* a statutory "affiliate" of the entity (Ameritech) that owned

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[4] Rehearing petitions have been filed in the case, and the court of appeals has asked for and received responses to the rehearing petitions. The decision on rehearing is pending.

the part of the cable system connecting the head-end and back-end of the system, running through municipal rights of way. The divided Seventh Circuit affirmed a divided decision of the Federal Communications Commission (Commissioner Tristani, dissenting) that concluded that the Cable Act's franchise requirements did not apply to ECI because it qualified for § 522(7)(B)'s private cable exemption to the definition of a cable system. *In the Matter of Entertainment Connections, Inc.*, FCC 98-111, 13 FCC Rcd. 14277 (1998) ("*ECI*").

The FCC's *ECI* decision did not reach the § 522(5)(A) "cable operator" definition issue reached by the Fifth Circuit in this case. *See ECI*, FCC 98-111, Tristani dissent, at 6 ("majority does not reach the issue"). The Seventh Circuit majority discusses § 522(5)'s ownership and control rules as "relevant factors" in the decision about whether § 541(b)(1)'s franchising requirements apply, but does not rest its determination on the "cable operator" definition, as did the Fifth Circuit. 199 F.3d at 432. Judge Rovner's dissent, on the other hand, concludes that ECI qualifies as a cable operator under both subsections (A) and (B) of § 522(5). 199 F.3d at 433.

The Seventh Circuit's *City of Chicago* decision leaves the application of the "cable operator" definition in an uncertain state. It does not rigidly hold, as did the Fifth Circuit, that ownership of the key front and back ends of a cable system do not constitute a significant ownership interest under § 522(5)(A);[5] however, it does suggest that

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[5] The dissent did address the issue and reached an even broader conclusion than reached by the dissent in the Fifth

"if the components of the operation are *completely* under separate ownership and control," the significant ownership interest requirement is not satisfied. 199 F.3d at 432 (emphasis added). Whether the affiliate relationship that is present in this case between Bell Video and Bell Telephone – and absent between ECI and Ameritech in *City of Chicago* – would be treated as "completely" separate ownership by the Seventh Circuit is unknown at this point. What is apparent is that, if the Seventh Circuit in *City of Chicago* followed the Fifth Circuit rationale, § 522(5) would have been determinative of the franchise issue, not merely a factor in considering it.

Eighth Circuit: *City of Ames*

In *City of Ames v. Heritage Communications, Inc.*, 861 F.2d 185 (8th Cir. 1988), the court of appeals required that franchise fees be paid for the cable service provided by a cable provider that did not have a cable franchise with the City of Ames but which was an affiliate of a cable provider that did have a cable franchise with the city. To reach this result, the Eighth Circuit construed the "cable operator" definition now found in § 522(5).

Circuit. Whereas the Fifth Circuit dissent rested its conclusion that the "cable operator" definition was satisfied by the affiliation between the businesses forming the two parts of the cable system, the Seventh Circuit dissent rested its conclusion on the principle that owning the front and back ends of the cable system (as ECI did there and as Bell Video does here) suffices to cross the "significant ownership" threshold of § 522(5)(A).

The franchised and unfranchised cable providers were affiliates of one another because they were subsidiaries of the same parent company, mirroring in this respect the affiliate relationship between Bell Video and Bell Telephone. The court determined that the parent and its subsidiaries were a "single operator[.]" 861 F.2d at 187. This conclusion did not rest on the kind of rigid reading of § 522(5) given by the Fifth Circuit. Instead, the court reviewed the factual details of the activities and relationships of the parent company and its subsidiaries. *Id.*

Uncertain rule

The Fifth Circuit is the only court of appeals thus far to adopt a rigidly narrow reading of § 522(5)'s "cable operator" definition. The Seventh Circuit eschewed rigidity for multi-factored flexibility, and the Eight Circuit rejected narrowness while using multi-factored flexibility to find coverage under the definition. The Court should take this case to resolve these differences and determine the standards for deciding the Cable Act's "cable operator" definition. It is basic to determining whether cable franchise requirements apply. Municipalities, cable providers, and other telecommunications interests across the country need to have a clearer rule.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

ANDREW MARTIN
City Attorney
City of Austin
P. O. Box 1088
Austin, Texas 78767-8828
(512) 499-2188
Fax: (512) 499-6490

RENEA HICKS*
LAW OFFICE OF
MAX RENEA HICKS
800 Norwood Tower
114 West Seventh Street
Austin, Texas 78701-3012
(512) 480-8231
Fax: (512) 476-4557
* *Counsel of Record*

Attorneys for Petitioner
City of Austin

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 98-50874

CITY OF AUSTIN,

Plaintiff-Appellant,

versus

SOUTHWESTERN BELL VIDEO SERVICES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas

(Filed Oct. 14, 1999)

Before EMILIO M. GARZA and PARKER, Circuit Judges, and FITZWATER, District Judge.*

EMILIO M. GARZA, Circuit Judge:

The City of Austin ("the City") claims that Southwestern Bell Video Service, Inc. ("SBVS"), a video programmer, must enter into a cable-television franchise agreement with it. The district court disagreed, granting summary judgment to SBVS. We affirm.

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* District Judge of the Northern District of Texas, sitting by designation.

SBVS, a wholly-owned first-tier subsidiary of SBC Communications, Inc. ("SBC"), provides video (*i.e.*, television) programming to multi-dwelling units (*i.e.*, apartment complexes) located in Austin, Texas. Its delivery of television programming to end-users (*i.e.*, subscribers) involves several steps. SBVS receives satellite and broadcast signals on equipment that it owns and operates.[1] It then routes the signals to a demarcation point located on the property of Southwestern Bell Telephone Company ("SWBT"), another wholly-owned first-tier subsidiary of SBC. After it receives the signals, SWBT sends them over its network of copper-wire and fiber-optic cables ("wire network") to various apartment complexes.[2] When the signals arrive at an apartment complex, they enter an in-house cable network, which delivers them to individual apartment units, where subscribers live.

Although they are owned by the same corporate entity (*i.e.*, SBC), SBVS and SWBT operate independently of one another. They share no officers or employees. SBVS pays SWBT for the video supertrunking service, and leases the space located on SWBT's property that serves as the demarcation point for the transfer of signals to the wire network. SWBT alone decides how it will transmit the signals through its wire network.

The City filed suit against SBVS, alleging that SBVS's failure to enter into a cable-television franchise

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[1] SBVS's equipment consists of multiple satellite dishes, a tower and antennae, and signal-processing equipment, known as "headend."

[2] The transmission service that SWBT provides to SBVS is called "video supertrunking service."

agreement with it violated the Communications Act of 1934 ("the Act")[3] and Texas' home-rule statute.[4] The district court, after considering stipulations filed by the parties, granted summary judgment to SBVS, holding that "SBVS is not a cable operator under the Act and is therefore not subject to the [Act's] franchise requirement."[5] The City timely appealed.

We review a grant of summary judgment *de novo*. *See Centennial Ins. Co. v. Ryder Truck Rental, Inc.*, 149 F.3d 378, 381 (5th Cir. 1999). Summary judgment is proper when "there is no genuine issue of material fact and . . . the moving party is entitled to a judgment as a matter of

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[3] Subject to an exception inapplicable to this case, the Act provides that "a cable operator may not provide cable service without a cable franchise." 47 U.S.C. § 541(b)(1).

[4] The home-rule statute provides that a home-rule city may, among other things:

> [P]rohibit the use of any street, alley, highway or grounds of the city by any telegraph, telephone, electric light, street railway, interurban railway, steam railway, gas company, or any other character of public utility without first obtaining the consent of the governing authorities expressed by ordinance and upon paying such compensation as may be prescribed and upon such condition as may be provided by any such ordinance.

TEX. REV. STAT. ANN. art. 1175(2) (West Supp.1999).

[5] Although it mentioned only the Act in its order, the district court disposed of all of the City's claims. SBVS's motion for summary judgment covered "all issues" raised in the City's pleading, and sought the entry of "a take nothing judgment on the City of Austin's claims." The district court granted the motion without qualification. On appeal, the City makes no argument that SBVS has violated the home-rule statute.

law." FED.R.CIV.P. 56(c). Factual stipulations can provide the basis for resolving a case at the summary judgment stage. *See Centennial*, 149 F.3d at 382.

The City argues that the district court erred in holding that SBVS is not a "cable operator." Under the Act, a "cable operator" is "any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system."[6] 47 U.S.C. § 522(5). This definition makes clear that, even if the arrangement between SBVS and SWBT is a "cable system,"[7] that fact alone is insufficient to establish SBVS

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[6] Neither party disputes that the commercial entities connected with this case – that is, SBVS, SWBT, and SBC – are "persons" under the Act, *see* 47 U.S.C. § 522(12) (defining "person" as "an individual partnership, association, joint stock company, trust, corporation, or governmental entity"), and that SBVS's television programming qualifies as "cable service" under the Act, *see id.* § 522(6) (defining "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service"). Further, there is no dispute that SBVS, SWBT, and SBC are all "affiliates" as defined by the Act. *See id.* § 522(2) ("affiliate . . . means another person who owns or controls, or is owned or controlled by, or is under common ownership with, such person.").

[7] For the sake of discussion, we accept the City's argument that the equipment of SBVS and the wire network of SWBT together comprise a "cable system" under the Act. *See id.* § 522(7) (defining "cable system" as "a facility, consisting of a

as a "cable operator." SBVS can qualify as a "cable operator" only if it meets one of two tests. First, under the "ownership" test, SBVS qualifies as a cable operator if it is a person or a member of a group of persons who either "directly or through one or more affiliates owns a significant interest" in a "cable system." *Id.* § 522(5)(A). Second, under the "control" test, SBVS is a cable operator if it "controls, or is responsible for, through any arrangement, the management and operation" of the "cable system." *Id.* § 522(5)(B).

The City asserts that SBVS fits into both of these descriptions. We disagree. SBVS "owns" and "controls" only some components of a "cable system" – satellite dishes, a tower and antennae, and "headend" – which collectively do not amount to a "significant interest" therein.[8] As the district court observed:

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set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which include video programming and which is provided to multiple subscribers within the community").

[8] The dissent suggests that SBVS meets the "ownership" test. However, while the combination of SBVS and SWBT may *constitute* a "cable system," even through its affiliate SBVS does not "own" anything more than its own pieces of the system – the satellite dishes, broadcast antennae, and "headend." As the District Court found,

> the Cable Act does not transform an entity into a cable operator merely because it is an affiliate of another entity which owns a cable system. *The entity itself*, through its affiliate or affiliates, must *also* "own [ ] a significant interest in such a cable system" . . .

> SWBV [*i.e.*, SBVS] and SWBT do not share any board members, corporate officers, or employees. SWBV's "space" at SWBT's central office site is leased. Moreover, SWBV does not have an exclusive right to use SWBT's supertrunking video service, and, like any other customer of SWBT to whom the service is available, must pay a standard tariff to utilize SWBT's service. In fact, once SWBV's transmissions pass over into SWBT's facilities, SWBV has no control, management, or responsibility over the manner in which SWBT provides its supertrunking video service. Furthermore, SWBV's headend equipment is entirely separate from SWBT's transmission facilities [*i.e.*, wire network].

City of Austin v. Southwestern Bell Video Services, No. A-98-CA-028, at 15 (W.D.Tex. July 31, 1998). SBVS is thus not a "cable operator" as defined by the Act.[9]

City of Austin, No. A-98-CA-028, at 15 (emphasis added); *cf. National Cable Television Ass'n, Inc. v. FCC*, 33 F.3d 66, 74 (D.C. Cir. 1994) (rejecting the assertion that "ownership of the component parts of a system is irrelevant to the question whether it is a cable system"). The dissent's analysis implies that separately incorporated entities have ownership interests in each other's assets merely because they have a common parent. We are unable to find any authority to support this principle.

[9] The dissent correctly states that we dispose of this case on a legal argument SBVS does not assert. Despite SBVS's failure to make this argument, we affirm on the express grounds upon which the District Court relied. *See City of Austin*, No. A-98-CA-028, at 14-16. We note in passing that SBVS may have omitted this argument because of the implications of the argument for SBC, SBVS's parent corporation. At oral argument, the City conceded that it will demand that SBC obtain a franchise for the SBVS-SWBT "cable system" if its claim against

Accordingly, the district court did not err in holding that SBVS need not enter into a cable-television franchise agreement with the City. We affirm.[10]

FITZWATER, District Judge, dissenting:

The majority opinion does not reach several issues of statutory construction that this appeal presents. The resolution of these questions is important to municipal franchising authorities, telecommunications companies, and the cable television industry.[1] Instead, it decides the case on a narrow basis that even the appellee does not advance, and in so doing misreads 47 U.S.C. § 522(5)(A). I respectfully dissent.

With exceptions not pertinent here, 47 U.S.C. § 541(b)(1) states that "a cable operator may not provide cable service without a franchise." Section 522(5) defines "cable operator" as

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SBVS is unsuccessful. Therefore, only by proving that SBVS falls within the "public right-of way" exception of § 522(7)(B) or the "common carrier" exception of § 522(7)(C) could *both* SBVS and SBC be exempted from entering into a cable franchise agreement with the City. As we hold that SBVS is not a "cable operator" as defined by the Act, we do not reach the questions of whether SBVS (or, for that matter, SBC) falls within either of the two exceptions.

[10] We deny as moot SBVS's Motion to Dismiss as Moot the City's Appeal Related to Its Claim for Injunctive Relief.

[1] The appellant requested oral argument on the ground that this appeal presents an issue of apparent first impression. The appellee recognized in its statement regarding oral argument that "[t]his appeal presents important statutory interpretation questions not previously resolved by an appellate court."

> any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such a cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system[.]

Section 522(2) provides that " 'affiliate', when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person[.]" The parties stipulated below, and the majority acknowledges, that Southwestern Bell Video Services, Inc. ("SBVS") and Southwestern Bell Telephone Company ("SWBT") are both wholly-owned first-tier subsidiaries of SBC Communications, Inc. ("SBC"). SBVS and SWBT are therefore under common ownership or control, and the two entities are affiliates.

The majority accepts *arguendo* "the City's argument that the equipment of SBVS and the wire network of SWBT together comprise a 'cable system' under the Act." It holds that SBVS is not a cable operator, however, because it " 'owns' and 'controls' only some components of a 'cable system' – satellite dishes, a tower and antennae, and 'headend' – which collectively do not amount to a 'significant interest' therein." Maj. Op. at 312 (footnote omitted). The majority quotes from the opinion below, in which the district court explained its basis for concluding that, even if SBVS's and SWBT's facilities together constitute a cable system, "there is no evidence that [SBVS] has significant ownership or control over the cable system." The majority and the district court interpret § 522(5)(A) to

mean that SBVS itself must have a significant ownership interest in the cable system, measured separately from its affiliate's ownership interest.[2] This conclusion misinterprets § 522(5)(A).

Section 522(5)(A) provides that the ownership of a significant interest in a cable system may be "direct[ ] or through one or more affiliates." As wholly-owned first-tier subsidiaries of SBC, SBVS and SWBT are under common ownership or control and are therefore "affiliates." There is no dispute for purposes of today's decision that the equipment of SBVS and the wire network of SWBT comprise a "cable system." It follows that because SBVS and SWBT together own all the equipment and network that constitute the cable system, SBVS owns a significant interest in it, at least through its affiliate.[3] I respectfully disagree with the majority's contrary interpretation.

Moreover, one would think that if this case could so easily be resolved based on this simple premise, SBVS

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[2] The district court also cited the Federal Communication Commission's ruling in *In re Entertainment Connections, Inc.*, FCC 98-111 (June 30, 1998). In *Entertainment Connections*, however, the provider of cable services unquestionably was not an affiliate of the local exchange carrier. *See id.* at ¶¶ 55-56.

[3] The majority responds by stating that "[t]he dissent's analysis implies that separately incorporated entities have ownership interests in each other's assets merely because they have a common parent." Maj. Op. at 5 n. 8. I respectfully disagree. I conclude that, directly or through SWBT, SBVS owns a significant interest in the cable system because SBVS and SWBT are affiliates who are under the common ownership or control of SBC, not because SBVS owns an interest in SWBT's assets. I am merely interpreting § 522(5)(A) as Congress enacted it, not attempting to rewrite corporate law.

would have vigorously raised and pressed this argument. But even SBVS does not ask that we affirm the district court on this reasoning.[4] Appellant City of Austin (the "City") asserts in its opening brief that, standing alone or in combination with SWBT, SBVS owns a significant interest in the cable system. It challenges the district court's contrary reasoning as neither supportable nor fully comprehensible. SBVS does not contest these contentions. It urges affirmance based on two exceptions to the definition of "cable system" found in § 522(7). SBVS argues that it does not use public right-of-way, thus falling within the exception of § 552(7)(B), and that its activities fall within the common carrier exception, § 552(7)(C).[5] As the City points out in its reply brief, SBVS "has not contested on appeal the proposition that it has the requisite interest or control in the cable system to bring it otherwise within

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[4] SBVS asserts in its statement of the issue that "[t]he sole issue before this Court is whether, for purposes of the Cable Act, SBVS operated a 'cable system' within the City of Austin and thus was a 'cable operator' who could be required by the City to obtain a municipal franchise and to remit franchise fees to the City." Appellee Br. at 2.

[5] In responding to one of the City's arguments concerning the applicability of the common carrier exception, SBVS focuses on the absence of a cable system rather than upon the definition of cable operator. *See* Appellee Br. at 31 ("[O]nly after the existence of a 'cable system' has been established does the 'cable operator' definition's reference to affiliates become relevant to any analysis.").

SBVS also argues that our decision in *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999), is distinguishable, and counters the policy arguments advanced by the City and amici curiae in the event the relevant statute is deemed to be ambiguous.

the reach of both subsections (A) and (B) of 47 U.S.C. § 522(5)." Appellant Rep. Br. at 3.

I respect the views of my able colleagues, but I would decide this case based on the important issues presented rather than upon a misinterpretation of the definition of "cable operator."

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CITY OF AUSTIN, PLAINTIFF, v. SOUTHWESTERN BELL VIDEO SERVICES, DEFENDANT.	A-98-CA-028 (Filed Aug. 03, 1998)

ORDER ON MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT, in the above-captioned cause of action, are Defendant's Motion for Summary Judgment, filed March 23, 1998; and Plaintiff's Motion for Summary Judgment Pursuant to Rule 56, filed March 25, 1998. Also before the Court are Plaintiff's Response to Defendant's Motion for Summary Judgment, filed April 3, 1998; Amicus Curiae Texas Cable & Telecommunications Association's (the "TCTA") Brief in support of the Plaintiff, field April 1, 1998; Defendant's Response to Plaintiff's Motion for Summary Judgment and to Amicus Curiae Brief of the TCTA, filed April 7, 1998; Defendant's Reply to Response to Plaintiff's Motion for Summary Judgment, filed April 10, 1998; Supplemental Response to Defendant's Motion for Summary Judgment, filed April 15, 1998; and the Reply Brief of Amicus Curiae, filed April 17, 1998. After considering the Motions, the summary judgment evidence, and the applicable standard of

review, it is the Court's opinion that the following Order is appropriate.

I. BACKGROUND

A. Procedural Background

The Plaintiff, the City of Austin ("Austin" or the "City"), originally brought the present cause of action in the Texas State District Court of Travis County on December 31, 1997. The Defendant Southwestern Bell Video Services ("SWBV") subsequently removed the instant case to the federal court on January 14, 1998. The City seeks both a declaratory judgment and injunctive relief against the Defendant for allegedly violating Title 47 U.S.C. § 541(b) by operating a cable television service since March of 1997 without obtaining a franchise from the City. SWBV, however, denies that it is subject to the local franchise requirements because it is not a cable operator and none of its facilities occupies the City's public rights-of-way. To dispense with the need for a fact-finding hearing, the parties filed their Stipulated Facts for Purposes of Cross-Motions for Summary Judgment on March 16, 1998. Finally, the parties filed cross-motions for summary judgment and the appropriate responses to the motions.

B. SWBV's Programming Service

The instant case involves a unique arrangement through which SWBV provides television programming to its customers. In addition to the City of Austin, SWBV

and Southwestern Bell Telephone ("SWBT") are the principle entities in this case.[1] Both SWBV and SWBT are wholly-owned, first-tier subsidiaries of SBC Communications, Inc. SWBV and SWBT do not have a common board of directors, nor are any members of the board of directors of either entity a member of the board of the other entity. Furthermore, SWBV and SWBT have no common officers and no common employees.

Under Austin's ordinance governing telecommunications franchises, the City has a telecommunications franchise agreement with SWBT.[2] *Stip. Ex. 1: Austin Ordinance No. 970213* (February 13, 1997); *Stip. Ex. 2: SWBT and Austin Franchise Agreement Ordinance No. 970403-K* (April 3, 1997). The franchise with SWBT is primarily based upon the fact that SWBT is a telecommunications service provider that installs, owns, maintains, and repairs extensive copper wire and fiber optic communications transmission media throughout the City, much of which is located in, over, or under the City's public rights-of-way. *See Stip. Ex. 1* at §§ 18-8-1, 18-8-2; *Stip. Ex. 2*. However, the City does not require franchise agreements from any

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[1] SWBT is not a party in the present cause of action.

[2] Many of SWBT's telecommunications activities are subject to the provisions of Title II of the federal Communications Act of 1934, *codified as amended* at 47 U.S.C. §151 *et seq.*, and to the provisions of the Texas Public Utility Regulatory Act, *codified as amended* TEXAS UTILS. CODE, Title 2, §11.01 *et seq.* SWBV, however, is claiming exemption from Title VI of the Communications Act covering cable systems.

end-user of telecommunications services who merely buys such services under SWBT tariffs.[3]

SWBV, on the other hand, provides a multi-channel television programming service to its subscribers that is similar to the service available to traditional cable subscribers. For example, SWBV provides its subscribers with access to cable networks like CNN and ESPN in addition to services from HBO and Showtime. *Stip. Ex. 7: SBVS Programming Options*. However, unlike traditional providers of cable television service,[4] SWBV does not install, own, maintain, or repair any copper wire, coaxial cable, or fiber optic communications transmission media, or any other communications transmission medium of any other type, located in, over, or under public rights-of-way, or any other equipment or facility of any sort that is located in, over, or under any public right of way.

Instead of constructing its own transmission paths, or cable lines, that cross public rights-of-way, SWBV utilizes SWBT's existing lines to deliver video programming to its subscribers. Specifically, SWBV buys signal transport services known as "Supertrunking Video Service" from SWBT's Tariff FCC No. 73, which was approved by the FCC. *Stip. Ex. 4: Tariff of FCC No. 73* (December 5, 1996).

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[3] For example, a bank with an office downtown and branches throughout the City does not enter into a franchise agreement with the City to allow it to make telephone calls over SWBT-owned lines or to use SWBT-owned lines to transmit data between the bank's offices.

[4] *See, e.g., Stip. Ex. 3: Austin-Time Warner Cable Franchise Agreement, Ordinance No. 960613-A* at Sec. 2.1 (June 13, 1996).

When SWBV buys this service from SWBT, SWBV specifies the delivery location where service is needed but it does not specify what transmission facilities or facilities route SWBT will use to provide service. *Id.* Thus, SWBV uses SWBT to deliver its "product" from "point A to point B" across public rights-of-way. Moreover, SWBT must also provide the Supertrunking Video Service to other video programming services under similar terms. *See* 47 U.S.C. §§ 202(a), 203(c); TEX. UTIL. CODE § 53.004(a).

By utilizing SWBT's supertrunking video service, SWBV is able to locate all of its equipment that is within Austin's city limits entirely on private property. All of SWBV's equipment used to provide service within Austin is located either (a) at, and within the physical boundaries of, one SWBT-owned Central Office site, or (b) within the private property of apartment complexes ("multiple dwelling units" or "MDUs") where SWBV's subscribers reside. SWBV maintains in its equipment at the SWBT Central Office site under a "Central Office Lease Agreement" in which SWBT is the landlord and SWBV is the tenant. SWBV had paid SWBT fees to segregate and build-out the space which it occupies, and pays SWBT monthly rent for the space it uses. SWBV's equipment at the SWBT Central Office in Austin consists of (a) multiple satellite dishes (to receive signals from multiple sources), (b) a tower and antennae to receive programming from the local stations that broadcast their programming locally, and (c) signal processing equipment, known as a "headend." The satellite dishes and antennae are connected to the headend, which is located within the Central Office.

The SWBV headend receives the various satellite and broadcast signals, assigns them to particular "channels," and convert the signals into a form that can be transported over SWBT's facilities. These signals are then routed to SWBT's designated "demarcation" point located on SWBT's private property, within the SWBT Central Office. SWBT then transports these signals, using only SWBT's equipment, over routes of its own choosing, to the demarcation point between SWBT's equipment and SWBV's receiving equipment. This second demarcation point is located on private property at MDUs. Finally, at the MDU demarcation points, SWBT delivers the signals back to SWBV in reasonably identical analog form, as specified in Tariff FCC No. 73. SWBV then distributes the signals as video programming to its subscribers. *Stip. Ex. 5: Schematic of SWBV Operations.*

II. STANDARD OF REVIEW

Generally, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see Hansen v. Continental Ins. Co.*, 940 F.2d 971, 975 (5th Cir. 1991); *Hogue v. Royse City*, 939 F.2d 1249, 1252 (5th Cir. 1991). After review of the stipulated facts filed in this case, the court finds that there are no genuine issues of material fact and will accordingly render its summary judgment decision on the legal issues before the Court.

III. DISCUSSION

The instant case turns upon the interpretation of terms in the Cable Communications Policy Act of 1984 ("Cable Act" or "Act"), Pub.L.No. 98-549, 98 Stat. 2780 (1984) (codified at 47 U.S.C. § 521 *eq seq.*), and the subsequent amendments to the Cable Act made in the Telecommunications Act of 1996 ("1996 Act"). Pub.L.No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 151 *et seq.*). The City contends that SWBV's television programming service is essentially identical to traditional cable television systems which must obtain local franchises before providing their service to the public. According to the City, SWBV, through its affiliate SWBT, is a *cable operator* providing a *cable service* through a *cable system* under the Cable Act. Thus, the City argues that SWBV must obtain a franchise from the City in order to continue providing its programming service.

In contrast, SWBV argues that the component ownership of the television programming system it uses exempts it from the franchise requirement under the Cable Act. Although SWBV provides video programming to its subscribers, SWBV argues that it fits under the Act's *private cable system exemption* because it has no control or ownership of the video programming facilities which cross public rights-of-way in this case. Moreover, SWBV arguers that federal law permits its relationship with SWBT and does not transform it into a *cable operator* subject to a cable franchise requirement.

A. The Cable Communications Policy Act of 1984

A principle objective of the Cable Communications Policy Act of 1984 is to "establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521(2) (1991); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 309 (1993). Thus, subject to certain exceptions, the Cable Act requires that "a cable operator may not provide cable service without a franchise." 47 U.S.C. § 541(b)(1) (Supp. 1998). Moreover, the Act provides that a franchising authority, which is "any governmental entity empowered by Federal, State, or local law to grant a franchise," 47 U.S.C. § 522(10) (Supp. 1998), may issue a franchise "which authorizes the construction or operation of a cable system." 47 U.S.C. § 522(9) (Supp. 1998); 47 U.S.C. § 541(a) (1991) & Supp. 1998); *Beach Communications, Inc.*, 508 U.S. at 309.

As a franchising authority under the Cable Act, the City of Austin contends that SWBV owes the City franchise fees because it is a *cable operator* that provides a *cable service* over a *cable system. See* TEX. REV. CIV. STAT. ANN. art. 1175 (Vernon's Supp. 1998); 47 U.S.C. § 541(b)(1) (Supp. 1998). congress has defined *cable operator* as "any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system." 47 U.S.C. § 522(5) (Supp 1998). A *cable service* is "(A) the one-way transmission to subscribers of

(i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6) (Supp. 1998). Finally, a *cable system* is generally "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." 47 U.S.C. § 522(7) (Supp. 1998).

The Cable Act, however, specifically *excludes* the following facilities from the definition of *cable system*:

> (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations;
>
> (B) a facility that serves subscribers without using any public right-of-way;
>
> (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter, except that such facility shall be considered a cable system (other than for purposes of section 541(c) of this title) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services;
>
> (D) an open video system that complies with section 573 of this title; or
>
> (E) any facilities of any electric utility used solely for operating its electric utility system;

47 U.S.C. § 522 (7) (Supp. 1998).

In the case at bar, SWBV appears to be clearly providing a *cable service* under the Cable Act because the closed transmission paths of SWBT provide a one-way transmission of video programming to SWBV's subscribers. *See* 47 U.S.C. § 522(6) (Supp. 1998); *Stip. Ex. 5*; *Stip. Ex. 7*. However, SWBV claims that it is exempt from paying cable franchise fees because its service falls into the private cable system exemption, 47 U.S.C. § 522(7)(B) (Supp. 1998), and because it is not a *cable operator*, 47 U.S.C. § 522(5) (Supp. 1998). The City, however, contends (1) that none of the Cable Act's exemptions apply in the instant case and (2) that SWBV's affiliation with SWBT clearly makes it a *cable operator* under the Cable Act.

B. The Private Cable System Exemption

The Cable Act's private cable system exemption is based on Congress's determination that "a facility that serves subscriber without *using* any public right-of-way" is not a cable system. 47 U.S.C. § 522(7)(B) (Supp. 1998) (emphasis added). However, no federal court has apparently decided whether an entity, which provides a cable service and whose facilities are entirely on private property, may fall within the private cable system exemption merely by utilizing a local telephone company's supertrunking video service to cross public rights-of-way. In other words, the courts have not answered whether *using* the public rights-of-way includes buying a telephone company's supertrunking video service.

In the instant case, because its own equipment does not invade the public rights-of-way, SWBV claims that its

cable service falls under the private cable system exemption to the Cable Act's franchise requirement. On the other hand, the City of Austin argues that SWBV is a cable operator under the Cable Act's plain language because, notwithstanding the service arrangement between SWBV and SWBT, SWBV is still *using* the public rights-of-way via a closed transmission path when its programming is distributed through SWBT's transmission network. *See* 47 U.S.C. § 522(7) (Supp. 1998); *PL's Resp. To Def.'s Mot. for Summ. J.* at 2-3. SWBV, however, equipped itself to being simply a customer of SWBT and contends that Congress intends the "using-public-rights-of-way" requirement to remain the physical invasion of the public rights-of-way by constructing or maintaining transmission lines across public rights-of-way. *Def.'s Mot. for Summ. J.* at 5-9. Unfortunately, the Cable Act's language does not plainly resolve whether a cable service provider is *using* the public rights-of-way when it delivers its programming through a telecommunications common carrier's supertrunking video service.

To resolve an ambiguity in a federal statute, the federal courts will defer to the "reasonable interpretation" of the federal agency that Congress has charged to administer that statute. *Microcomputer Technology Inst. v. Riley*, 139 F.3d 1044, 1047 (5th Cir. 1998) (citing *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)). Thus, in the case at bar, the Court will give due deference to the Federal Communications Commission ("FCC" or "Commission") which is charged with administering the Cable Act. *See* 47 U.S.C. § 151 (Supp. 1998); *Nat'l Cable Television Ass'n. Inc. v. FCC*, 33 F.3d 66, 70

(D.C. Cir. 1994) (giving substantial deference to the FCC's interpretation of cable statutes).

In *In re Entertainment Connections, Inc.*, FCC 98-111 (June 30, 1998), the FCC recently held that Entertainment Connections, Inc. ("ECI") was not a *cable operator* subject to § 541(b)'s franchise requirement. *Id.* at ¶¶ 61-62. The *ECI* case is similar to the present case in many important respects: (1) ECI provided video programming to apartment complexes, (2) all of ECI's equipment was located on private property, and (3) in order to reach its subscribers, ECI utilized an FCC-tariffed supertrunking video service provided by a local telecommunications company. *Id.* at ¶¶ 5-7. Considering that ECI's own equipment remained on private property and that Ameritech, a local telecommunications company, provided a supertrunking video service to ECI which crossed public rights-of-way, the Commission "conclude[d] that ECI's facilities and Ameritech's facilities d[id] not constitute a single, integrated cable system" and "that ECI qualifie[d] for the private cable exemption." *Id.* at ¶ 62.

The FCC reasoned that the "public safety and convenience and management of public rights-of-way . . . provide a key premise for the cable franchise requirement." *Id.* Thus, "a cable operator's construction in and use of public rights-of-way is an important factor, and advantage, underlying the Communication Act's requirement that all cable operators be franchised." *Id.* Indeed, where a cable service's own equipment does not cross public rights-of-way, the Commission reasoned that "the underlying premise trying the franchise requirement to the use of public rights-of-way is not present." *Id.* Furthermore, if the cable service utilizes a separate service

like supertrunking video to cross public rights of way, the Commission observed that it is the provider of the supertrunking video service, not the cable service provider, who "must comply with a range of safety, convenience, and other requirements" underlying a franchise agreement. *Id.*

Consequently, asked to examine the definition of *using* the public rights-of-way, the FCC explained that "[i]t is Ameritech, not ECI, that uses the rights-of-way, as the Commission and courts have interpreted the term, whether for installations, repair or maintenance of its facilities." *Id.* The Commission noted that "[w]e cannot conclude that ECI's mere interaction with Ameritech's authorized facilities in the public right-of-way is the type of use to which Congress spoke in defining what constitutes a cable system." *Id.*[5] Indeed, to hold otherwise and require ECI to obtain a franchise would be "needlessly duplicative" because Ameritech's facilities were already under local telecommunication regulations. *Id.*

The Court agrees with the FCC's decision and finds that it is a reasonable interpretation of an ambiguous statutory term. The rationale for allowing local authorities to require franchises for cable companies that are subject to federal regulation has long been the extensive use that such cable operators make of a locality's public

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[5] The FCC's interpretation of what constitutes "using" the public rights-of-way is consistent with previous views that an entity is not a cable operator if it utilizes the video dialtone service provided by local telephone companies to transmit video signals over public rights-of-way. *Nat'l Cable Television Ass'n. Inc. v. FCC*, 33 F.3d 66 (D.C. Cir. 1994).

rights-of-way. Quite simply, local authorities are entitled to compensation (1) for the physical intrusion of a cable operator's facilities on the public rights-of-way and (2) for the access that a franchise agreement gives the cable operator to those rights-of-way. Accordingly, the FCC has noted that "[t]he dual federal-local jurisdictional approach to regulating cable television service is largely premised on the fact that cable systems necessarily involve extensive physical facilities and substantial construction upon and use of public rights-of-way in the communities they serve." *In re Definition of a Cable System*, 5 F.C.C.Rcd. 7638 at ¶ 10 (February 1, 1990). Moreover, in *Guidry Cablevision/Simulation Vision Cable System v. City of Ballwin*, 117 F.3d 383 (8th Cir. 1997), the Eighth Circuit Court of Appeals noted that "[t]raditional cable systems deliver programming throughout a municipality by means of cables laid under city streets or along utility lines. . . . [and that they] thereby make extensive use of public rights-of-way, avoiding the need to negotiate easements with countless private property owners." *Id.* at 385. According to the circuit court, "[t]his active interaction between cable operators and local governments is also the reason for the F.C.C.'s long-standing tolerance of local cable franchising." *Id.*

Indeed, within the Cable Act itself, there is "a congressional indication that video distributors that transmit their signals over public rights-of-way through the use of a [local exchange carrier's] common carrier platform not be deemed cable systems." *In re Entertainment Connections, Inc.*, FCC 98-111 at ¶ 52 (June 30, 1998). For example, the Cable Act originally excluded from the definition of cable system all facilities that did not cross public

rights-of-way *and* served subscribers living in commonly owned or controlled multiple unit dwellings. 47 U.S.C. § 522(6)(B) (pre-1996 amendments).[6] However, the Telecommunications Act of 1996 amended and expanded the private cable system exemption to encompass *all* facilities not using any public right-of-way. 47 U.S.C. § 522(7)(B) (Supp. 1998). Moreover, in 47 U.S.C. § 541(a)(2), Congress has provided that "[a]ny franchise shall be construed to authorize the *construction* of a cable system over public rights-of-way and through easements." 47 U.S.C. § 541(a)(2) (1991) (emphasis added).[7] Thus, taken together, the statutory provisions show that "Congress clearly indicated its desire that the private cable exemption be more broadly available than prior to the 1996 Act," *In re Entertainment Connections, Inc.*, FCC 98-111 at ¶ 62 (June 30, 1998), and that Congress contemplated the *construction* of traditional cable systems when crafting the "using-public-rights-of-way" requisite for the private cable system exemption.[8]

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[6] Former 47 U.S.C. §522(6)(B) provided that a "cable system" did not include "a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way." 47 U.S.C. § 522(6)(B) (1991).

[7] "The provision is clearly designed to ensure access by cable operators to public rights-of-way and easements for purposes of building and maintaining cable systems, while at the same time ensuring that the owner of the property on which a right-of-way or easement sits does not have to pay for such installation and maintenance." *In re Department of Defense Cable Television Franchise Agreements*, 36 Fed.Cl. 171, 176 (Cl. Ct. 1996).

[8] This Court's decision also comports with recent decisions in the U.S. Western and Northern Districts of Texas essentially

Therefore, the Court finds that SWBV's cable service falls into the private cable system exemption of 47 U.S.C. § 522(7)(B). A cable service provider may utilize a local exchange carrier's supertrunking video service in order to avoid placing its own equipment in a public right-of-way.[9] Although SWBV appears in all functional respects to be a cable operator, SWBV is not *using* the public rights-of-way to provide service to its subscribers. In short, this is simply a case where what looks and quacks like a duck is just not a duck.

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finding that a municipality's franchise requirement for telecommunication service providers is premised upon the telecommunication service provider's "use" of the public rights-of-way in terms of ownership of the network of cables and other communications media that physically occupy the public rights-of-way. *See AT&T Communications of the Southwest, Inc. v. City of Dallas*, Doc. No. 3:98-CV-003-R (N.D. Tex. June 8, 1998); *AT&T Communications of the Southwest, Inc. v. City of Austin*, Doc. No. A-97-CA-532-SS (W.D.Tex. June 4, 1998).

[9] The Court agrees with the policy argument that cable franchises involve more than compensation for use of the public rights-of-way because cable franchises essentially prevent monopolies over the programming to which cable subscribers are exposed. Thus, municipalities may use cable franchise agreements to "assure that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521(2) (1991). However, the Court must consider that Congress has created a specific exemption for private cable systems and that "[s]uch scope-of-coverage provisions are unavoidable components of most economic or social legislation . . . [for which] Congress had to draw the line somewhere; it had to choose which facilities to franchise." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 316 (1993).

C. Significant Ownership Interest Through One or More Affiliates?

Even if SWBV's facilities do not use the public rights-of-way, the City contends that SWBV must still pay franchise fees because of its affiliate relationship with SWBT. The City essentially argues that, when affiliates' facilities combine to provide a cable service, the Cable Act defines the affiliated cable service provider as a cable operator subject to the franchise requirement. The City is only partially correct.

When (1) the affiliate relationship demonstrates *ownership of a significant interest* in a cable system or (2) when an arrangement creates *responsibility for the management and operation* of a cable system, a franchising authority may properly require the entity providing cable service to obtain a cable franchise. 47 U.S.C. § 522(5) (Supp. 1998). The cable Act states that an " 'affiliate', when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person." 47 U.S.C. § 522(7)(C) (Supp. 1998). Thus, the Cable Act does not transform an entity into a cable operator merely because it is an affiliate of another entity which owns a cable system. The entity itself, through its affiliate or affiliates, must *also* "own[] a significant interest in such cable system" or "otherwise control[] or [be] responsible for, through any arrangement, the management and operation of such a cable system." 47 U.S.C. § 522(5) (Supp. 1998).

For example, in *City of Ames v. Heritage Communications*, 861 F.2d 185 (8th Cir. 1988), the Eighth Circuit Court

of Appeals held that a cable company and its subsidiaries are subject to the Cable Act's franchise requirement when the companies deliver a cable service "through the joint efforts of related companies who form a single cable operator and system, and who use city property to provide the service." *Id.* at 188. In particular, the appellate court pointed to the district court's findings that the parent company, Heritage Communications, negotiated many of its subsidiaries' contracts, co-signed for the rental of public transmission line poles for its subsidiaries, and shared many of the same equipment with its subsidiaries. *Id.* at 187-88. Consequently, the parent company clearly owned a significant interest in its subsidiaries *and* was responsible for the management and operation of the cable system. *Id.* at 187. In contrast, the FCC's recent *ECI* ruling involved a cable service provider and a local exchange carrier who were *completely unaffiliated* with each other:

> [In ECI's case,] there is an absolute separation of ownership between ECI's headend facilities, which are located entirely on private property, and the transmission facilities owned and controlled by Ameritech. ECI has no financial interest in Ameritech and Ameritech has no financial interest in ECI. The companies are in no way affiliated. . . . In short, there is absolutely no evidence that the relationship between Ameritech and ECI is other than a 'carrier-user' relationship. . . . [Ameritech] has no affiliation whatever with ECI and no obligation to use the facilities exclusively for ECI.

In re Entertainment Connections, Inc., FCC 98-111 at ¶¶ 55, 56 (June 30, 1998). The FCC therefore determined that ECI

and Ameritech's relationship was like a carrier-user relationship in which ECI had no significant interest or control in Ameritech's transmission facilities. *Id.* at ¶ 50.[10]

Under the facts of the instant case, the plain wording of the Cable Act does not transform SWBV and SWBT into a single integrated cable operator subject to the franchise requirement. The Court agrees that SWBV and SWBT are "affiliates" under the Act. Both entities are wholly owned first-tier subsidiaries of SBC Communications, Inc. Therefore, they are affiliated under common ownership. *See* 47 U.S.C. § 522(7)(C) (Supp. 1998). However, assuming that SWBT's and SWBV's facilities constitute a *cable system*, there is no evidence that SWBV has significant ownership or control over the cable system. SWBV and SWBT do not share any board members, corporate officers, or employees. SWBV's "space" at SWBT's central office site is leased. Moreover, SWBV does not

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[10] A note in former 47 C.F.R. § 63.54(c) provides some guidance regarding what does not constitute a simple carrier-user relationship:

> Examples of situations in which a carrier and its customer will be deemed to be controlled or having a relationship include the following, among others: Where one is the debtor or creditor of the other (except with respect to charges for communication services); where they have a common officer, director, or other employee at the management level; where there is any element of ownership or other financial interest by one in the other; and where any party has a financial interest in both.

47 C.F.R. § 63.54(c)(Note) (repealed 1996). Of course, 47 U.S.C. § 522(5) further requires that an affiliate have a "significant interest" in the cable system, not just *any* financial interest.

have an exclusive right to use SWBT's supertrunking video service, and, like any other customer of SWBT to whom the service is available, must pay a standard tariff to utilize SWBT's service. In fact, once SWBV's transmissions pass over into SWBT's facilities, SWBV has no control, management, or responsibility over the manner in which SWBT provides its supertrunking video service. Furthermore, SWBV's headend equipment is entirely separate from SWBT's transmission facilities. The City can only point out that SWBV is an affiliate of SWBT; this is not enough. Thus, because the Court cannot say that the affiliate relationship in this case gives SWBV a significant ownership interest or responsibility over the management and operation of a cable system, SWBV is not a cable operator required to obtain a franchise from the City of Austin.[11]

---

[11] The Court agrees with the City that the Cable Act provides for regulation of common carriers like SWBT to the extent that they provide a cable service directly to their customers. 47 U.S.C. §§522(7)(c), 571(a)(2) (Supp. 1998). The Cable Act appears to condition such regulation on the common carrier's choice to enter the cable service market, soliciting its own cable subscribers and using its own transmission facilities. However, because SWBT is not a part in this case, there are no common carrier issues before the Court. Accordingly, counsel cannot rely upon statutory provisions that obviously do not apply to SWBV. *See In re Entertainment Connections, Inc.*, FCC 98-111 at ¶48 (June 30, 1998) ("We cannot perceive an intent, express or inferred, on the part of Congress to address in Section 651(a)(2) [codified at 47 U.S.C. §571(a)(2)] the regulatory status of video distributors that purchase common carriage of video traffic service.")

IV. CONCLUSION

The Court finds that SWBV is not a cable operator under the Cable Communications Policy Act of 1984 and is therefore not subject to the franchise requirement of 47 U.S.C. § 541(b)(1). SWBV falls under the Cable Act's private cable system exemption. Furthermore, SWBV's and SWBT's facilities do not constitute a single cable operator.

Accordingly,

IT IS ORDERED that the Defendant's Motion for Summary Judgment is hereby **GRANTED.**

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment Pursuant to Rule 56 is hereby **DENIED.**

IT IS FURTHER ORDERED that this action is hereby **DISMISSED WITH PREJUDICE.** Costs are assessed against the Plaintiff.

IT IS FINALLY ORDERED that all pending motions are hereby **DENIED AS MOOT.**

SIGNED this 31 day of July, 1998.

/s/ Lucius D. Bunton
HONORABLE
LUCIUS D. BUNTON III
SENIOR U.S. DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50874

CITY OF AUSTIN

Plaintiff – Appellant

v.

SOUTHWESTERN BELL VIDEO SERVICES, INC.

Defendant – Appellee

Appeal from the United States District Court
for the Western District of Texas, Austin

(Filed Nov. 16, 1999)

ON PETITION FOR REHEARING

Before EMILIO M. GARZA and PARKER, Circuit Judges, and FITZWATER, District Judge.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/ Emilio M. Garza
United States Circuit Judge

REHG-2

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*District Judge of the Northern District of Texas, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50874

D.C. Docket No. A-98-CV-28-~~JN~~ LB

CITY OF AUSTIN

Plaintiff – Appellant

v.

SOUTHWESTERN BELL VIDEO SERVICES, INC.

Defendant – Appellee

Appeal from the United States District Court
for the Western District of Texas, Austin.

Before EMILIO M. GARZA and PARKER, Circuit Judges, and FITZWATER*, District Judge.

JUDGMENT

(Filed Oct. 14, 1999)

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

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*District Judge of the Northern District of Texas, sitting by designation.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

FITZWATER*, District Judge, dissenting:

ISSUED AS MANDATE: NOV 24 1999

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*District Judge of the Northern District of Texas, sitting by designation.

STATUTES INVOLVED IN THE CASE

47 U.S.C. § 522: For purposes of this subchapter –

(2) the term "affiliate", when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person;

. . . .

(5) the term "cable operator" means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system;

(6) the term "cable service" means –

(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and

(B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service;

(7) the term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include . . . (B) a facility that serves subscribers without using any public right-of-way; (C) a facility of a common

carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter, except that such facility shall be considered a cable system (other than for purposes of section 541(c) of this title) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services . . . ;

(9) the term "franchise" means an initial authorization, or renewal thereof . . . , issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system;

(10) the term "franchising authority" means any governmental entity empowered by Federal, State, or local law to grant a franchise[.]

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47 U.S.C. § 541(b):

(1) Except to the extent provided in paragraph (2) and subsection (f) of this section, a cable operator may not provide cable service without a franchise.

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47 U.S.C. § 541(c):

Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.

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47 U.S.C. § 571(a):

(1) Radio-based systems

To the extent that a common carrier (or any other person) is providing video programming to subscribers using radio communication, such carrier (or other person) shall be subject to the requirements of subchapter III of this chapter and section 572 of this title, but shall not otherwise be subject to the requirements of this subchapter.

(2) Common carriage of video traffic

To the extent that a common carrier is providing transmission of video programming on a common carrier basis, such carrier shall be subject to the requirements of subchapter II of this chapter and section 572 of this title, but shall not otherwise be subject to the requirements of this subchapter. This paragraph shall not affect the treatment under section 522(7)(C) of this title of a facility of a common carrier as a cable system.

(3) Cable systems and open video systems

To the extent that a common carrier is providing video programming to its subscribers in any manner other than that described in paragraphs (1) and (2) –

(A) such carrier shall be subject to the requirements of this subchapter, unless such programming is provided by means of an open video system for which the Commission has approved a certification under section 573 of this title; or (B) if such programming is provided by means of an open video system for which the Commission has approved a certification under section 573 of this title, such carrier shall be subject to the requirements of this

part, but shall be subject to parts I through IV of this subchapter only as provided in 573(c) of this title.

(4) Election to operate as open video system

A common carrier that is providing video programming in a manner described in paragraph (1) or (2), or a combination thereof, may elect to provide such programming by means of an open video system that complies with section 573 of this title. If the Commission approves such carrier's certification under section 573 of this title, such carrier shall be subject to the requirements of this part, but shall be subject to parts I through IV of this subchapter only as provided in 573(c) of this title.

Supreme Court, U.S.
FILED
MAR 16 2000
CLERK

(2)

No. 99-1368

IN THE

Supreme Court of the United States

CITY OF AUSTIN, TEXAS,

Petitioner,

v.

SOUTHWESTERN BELL VIDEO SERVICES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JOHN J. MCKETTA, III
Counsel of Record
MICHAEL DIEHL
EDWARD STEVENS MCHORSE
GRAVES, DOUGHERTY, HEARON
& MOODY, P.C.
Attorneys for Respondent
515 Congress, Suite 2300
Austin, Texas 78701
(512) 480-5600

158481

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Parties:

Appellant below: The City of Austin, Texas

Appellee below: Southwestern Bell Video Services, Inc.

Rule 29.6 Statement:

Southwestern Bell Video Services, Inc., is a wholly owned subsidiary of SBC Communications Inc., a company whose stock is publicly traded.

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PRELIMINARY STATEMENT

The City of Austin (the "City") asks this Court to review a fact-bound District Court decision against the City on only one of the two alternative grounds relied upon by the District Court, and in the absence of any actual conflict among the circuits.

The District Court held that a video programming provider using a common carrier's transport services to transmit signals across a city does not thereby "use" the municipal rights-of-way for regulatory purposes under the Cable Communications Policy Act of 1984, as amended, 47 U.S.C. §§ 521-573. City's App. 27 and 32 (ruling); *id.* 21-27 (reasoning). The District Court also held, separately, that the particular relationship of the common carrier and video programming provider shown by the facts in this case did not make the video provider a "cable operator" who was obligated to obtain a municipal franchise. *Id.* 28-32.

The Fifth Circuit affirmed on the second ground, without reaching or disagreeing with the District Court's first ground. Both bases for the District Court's judgment are consistent with a contemporaneous decision by the Federal Communications Commission, on similar but not identical facts, that was subsequently affirmed by the Seventh Circuit.

The City asserts that these two Court of Appeals decisions and a third, similarly fact-specific decision from the Eighth Circuit produce, in the City's view, an "unsettled" (City's Petition 7), "clouded" (*id.* 12), "muddled" (*id.* 13) or "[u]ncertain" rule of law (*id.* 16), but the City does *not* claim that these decisions reflect an actual inter-circuit conflict.

There is no conflict among the circuits; the Fifth Circuit applied the statute correctly on the facts presented in the record; and, in any event, either of the alternative grounds relied upon by the District Court supports the judgment. Under these circumstances, Respondent respectfully urges this Honorable Court to deny the City's petition for writ of certiorari.

COUNTER-STATEMENT OF THE CASE

A. Factual Background

Southwestern Bell Video Services, Inc. ("SBVS") initially offered television programming delivery services to customers within the City by placing satellite and broadcast antennae at individual apartment complexes and delivering programming received by those antennae to the residents.

Thereafter, in December 1996, the Federal Communications Commission ("FCC") approved a new telecommunications service tariff for Southwestern Bell Telephone Company ("Bell Telephone"), a company that provides telephone and telecommunications services throughout the City and in other areas. District Court Order on Motion for Summary Judgment ("Order"), City's App. 15. Although SBVS and Bell Telephone are both wholly-owned first-tier subsidiaries of a common corporate parent (SBC Communications Inc.), they do not have any shared or common directors, officers, or employees. *Id.* 14.[1]

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1. In this Response, citations to "App." in every instance refer to the Appendix to the Petition filed by the City of Austin.

Bell Telephone is a certificated telecommunications carrier under Texas law and a "common carrier" for purposes of Titles I and II of the Communications Act of 1934, 47 U.S.C. §§ 151-276. At all relevant times, Bell Telephone operated under a telecommunications franchise agreement with the City, premised on its placement and use of communications facilities within the City's rights-of-way. Order, App. 14. Under that franchise, Bell Telephone pays the City fees for lines in the City that are used to provide any telecommunications services within the scope of Title II of the Communications Act of 1934. *Austin Ordinance No. 970213-E* (Ordinance, Feb. 13, 1997) § 18-8-3(11) and (12) and § 18-8-11 (Stipulations filed in District Court ("Stips.") Exh. 1); *Austin Ordinance No. 970213-K* (franchise consent for Bell Telephone, Apr. 3, 1997) Part 3(A) and (B) (Stips. Exh. 2).

Bell Telephone's 1996 tariff FCC No. 73 included provisions for a signal transport service called "Supertrunking Video Service" ("Supertrunking"), under which any potential customer could obtain transport of video signals through Bell Telephone's telecommunications facilities for a tariffed price. Stips. Exh. 4 (Tariff No. 73); Order, App. 15-16. Under that tariff, the customer specifies where it will turn over its traffic to the common carrier and the locations where delivery is needed, but the customer "does not specify what transmission facilities or . . . route [the common carrier] will use to provide service." *Id.* 16. Bell Telephone transports the customer's signals "using only [its own equipment], over routes of its own choosing" to the specified delivery address. *Id.* 17.[2]

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2. "In fact," the District Court noted, "once [SBVS'] transmissions pass into [Bell Telephone's] facilities, [SBVS] has (Cont'd)

After this service became available, SBVS altered the manner in which it operated, contracting with Bell Telephone for the build-out and use of space in a single location at one of the latter's central offices where SBVS could locate its signal-reception equipment and deliver its traffic to Bell Telephone. *Id.* 16. SBVS also purchased service under the Supertrunking tariff to have Bell Telephone deliver SBVS' signal traffic to demarcation points at specified apartment complexes, where SBVS' own equipment received the traffic, reconfigured it, and delivered programming to SBVS' subscribers. *Id.* 15 and 17.

B. Proceedings in the District Court

Contending that a municipal franchise was required for SBVS' operations, the City sued SBVS, but not Bell Telephone or SBC Communications Inc. The parties prepared stipulations consisting of both factual statements and documents, and filed cross-motions for summary judgment.

(Cont'd)
no control, management, or responsibility over the manner in which [Bell Telephone] provides its supertrunking video service." *Id.* 31. The City thus misstates the relationship of the common carrier and its customer using Supertrunking by alleging that the service involves "*routes . . . leased* to Bell Video." City's Petition 3 (emphasis added). As the District Court made clear (and as the City stipulated below, *see* Stips. No. 15), a Supertrunking customer has no control at all over what routes the common carrier elects to use. SBVS also disagrees with comments in the City's "Statement of the Case" that do not simply state the unadorned relevant facts but are, instead, argumentative in nature and completely without any record support, such as the assertions that SBVS and Bell Telephone "teamed up to provide a new cable service in Austin" (*id.* 2) or that there was any sort of "cable service arrangement between [SBVS] and Bell Telephone" (*id.*). *See* Supreme Court Rule 15.2.

While these motions were pending, the FCC issued a ruling involving the same core legal issue: whether a programming provider had to obtain a municipal franchise under 47 U.S.C. § 541(b) [Cable Act § 621(b)] if the provider used a common carrier's Supertrunking service to send its video signals across a city, but had no facilities of its own in any city right-of-way. *In the Matter of Entertainment Connections, Inc.*, FCC 98-111, 13 FCC Rcd. 14277 (1998) ("*In re ECI*").[3]

The FCC ruled that no municipal franchise was required, on two distinct grounds. The FCC concluded, first, that the facilities of the common carrier (Ameritech) and of ECI "do not constitute a single, integrated cable system"[4] and, therefore, ECI "is not a cable operator[5]. . . because it does not provide service to its subscribers through a cable system." *In re ECI* ¶ 61. Second, the FCC examined the question of whether a video provider was "using" city rights-of-way for franchise requirement purposes if its presence in city streets consisted merely of its signals transported in a common carrier's lines. The FCC concluded, "We also find that ECI qualifies for the private cable exemption . . . which provides that 'a facility that serves subscribers without using any

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3. The FCC's *In re ECI* decision refers to sections of the Cable Communications Policy Act of 1984 (the "Cable Act"), rather than to the codification cited by the City, District Court and Fifth Circuit. For ease of reference, this response provides parallel citations.

4. The term "cable system" is defined, and exceptions to that definition are set out, in Cable Act § 602(7), 47 U.S.C. § 522(7).

5. The term "cable operator" is defined in Cable Act § 602(5), 47 U.S.C. § 522(5).

public rights of way' does not constitute a cable system . . . ." *In re ECI* ¶ 62.[6]

SBVS' pending motion for summary judgment contended that the delivery of its video signals to a common carrier for transport, where only the common carrier's facilities were located in City rights-of-way, fell within this statutory "without using" exception. The District Court agreed. Order, App. 27 and 32 (ruling); *id.* 21-27 (reasoning). In addition to concluding that there was no "cable system" subject to franchise requirements, the District Court also ruled that the affiliate relationship between SBVS and Bell Telephone did not make SBVS a "cable operator." *Id.* 28-32.[7]

The District Court's Order did not discuss the second statutory exception that SBVS claimed in its pleadings — the exemption from the "cable system" definition applicable to "a facility of a common carrier . . . subject to the provisions of Title II of [the Communications] Act." 47 U.S.C. § 522(7)(C); Cable Act § 602(7)(C).

C. Proceedings at the Fifth Circuit

After the City appealed, and after briefs were filed in the Fifth Circuit, SBVS ceased using Supertrunking in the

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6. The "without using" exception to the "cable system" definition is set out in Cable Act § 602(7)(B), 47 U.S.C. § 522(7)(B).

7. The franchise requirement applies only to a "cable operator." 47 U.S.C. § 541(b). The "cable operator" definition (*id.* § 522(5)), in turn, applies only to a "cable system," defined in 47 U.S.C. § 522(7). SBVS' motion contended that the primary dispositive question was whether its activities fit within the statutory definition of a "cable system" (taking the statutory exceptions of 47 U.S.C. § 522(7)(B) and (C) into consideration).

City. Instead, SBVS located antennae at each apartment complex. SBVS accordingly moved to dismiss as moot the City's appeal insofar as the City had appealed the denial of injunctive relief. The Fifth Circuit carried this motion with the case and denied it as moot when it affirmed the District Court. App. 7 n.10.

In the appeal, the City contended that the statutory "cable operator" definition applied because SBVS and Bell Telephone were affiliates. SBVS' arguments focused primarily on the statutory "cable service" definition and two exceptions to that definition — the "without using" provision and the "facility of a common carrier" provision. SBVS pointed out that the "cable operator" definition applied only where there was a "cable system," and that the absence of a cable system precluded treating SBVS as a "cable operator" (*see* App. 10 n.5).[8]

In deciding the case, the Fifth Circuit accepted, "for the sake of discussion," the City's contention that the SBVS equipment and its use of Supertrunking constituted a "cable system." App. 4 n.7. The Court then focused on the City's contention that the common ownership of SBVS and Bell Telephone caused SBVS' use of Supertrunking to come within the "cable operator" definition — 47 U.S.C. § 522(5). App. 4-6. On the undisputed facts noted by the District Court (and as stipulated by the City), the Court concluded that SBVS did not own a "significant interest" in a cable system and that it did not "control[ ]" such a system. *Id.* 5-6.

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8. SBVS' discussion of the "cable operator" definition in its Fifth Circuit Brief focused on the contentions that the City's " 'common ownership' theory" (Brief of Appellee 30) and " 'integrated system' argument" (*id.* 35) disregarded, required modifying, or nullified other provisions of the Cable Act. *Id.* 30-35.

The Fifth Circuit did not address the "without using" exception to the cable system definition, which was the alternative basis for the District Court's judgment.

REASONS FOR DENYING THE WRIT

I.

THE FIFTH CIRCUIT DECISION PRESENTS NO QUESTION WORTHY OF CERTIORARI UNDER SUPREME COURT RULE 10.

Although Rule 10(a) speaks of "a decision in conflict with the decision of another court of appeals," the City does not, in fact, contend that any actual conflict exists between the Fifth Circuit's decision and that of any other court of appeals. Instead, the City asserts that there is, at most, a lack of perfect clarity in or parallelism among three decisions. But even this claim is exaggerated, as each decision reflects the application of the Cable Act's provisions to a distinct factual situation.

A. The Seventh Circuit's *City of Chicago* decision

The City concedes that *City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999), presented facts that are "similar, but not identical" to those of this case (City's Petition 13). In that case, a video programming provider, ECI, similarly used services purchased under the Supertrunking tariff of a common carrier, Ameritech, to handle the transport of video signals from a headend through a city's rights-of-way to apartment complexes. The central factual difference was that ECI was not an affiliate of the common carrier.

The Court had before it the FCC's decision ruling that ECI was not required to obtain a franchise for two distinct reasons. First, the FCC had held that "ECI's facilities and Amertech's facilities do not constitute a single, integrated cable system" and, thus, the "cable operator" definition in 47 U.S.C. § 522(5) did not apply to ECI. *In re ECI* ¶ 61. Second, the FCC had ruled that ECI's delivery of signals to a telecommunications common carrier for it to transport through rights-of-way on the common carrier's own facilities fell within the "without using" exception of 47 U.S.C. § 522(7)(B), so that there was in any event no "cable system" subject to municipal franchise requirements. *In re ECI* ¶¶ 62-63.

The Seventh Circuit affirmed *each* aspect of the FCC's decision. *City of Chicago*, 199 F.3d at 431-32 (affirming the decision that ECI was not a "cable operator"); *id.* at 432-33 ("[i]n addition," affirming that ECI was providing service "without using" city rights-of-way). Although the first ruling treated the lack of affiliation between ECI and Ameritech and their "separate ownership and control" of their own facilities as a relevant factor (*id.* at 432), the Court's analysis of the "without using" basis for the FCC's decision was premised on the recognition that it was Ameritech, not ECI, that had facilities located in municipal rights-of-way (*id.* at 432-33).

The interpretation of the "without using" provision of the Cable Act in *City of Chicago* is substantively identical to the alternate ground on which the District Court granted SBVS summary judgment in this case. The City's Petition is silent about this. Instead, the City focuses only on differences between the analytical approaches the Seventh Circuit and Fifth Circuit applied to the statute's "cable

operator" definition. Describing the Seventh Circuit's reasoning as "indefinite" and "multi-factored," the City asserts that the *Seventh Circuit's* decision (*not* the Fifth Circuit's) "leaves the application of the 'cable operator' definition in an uncertain state" (Petition at 13). In contrast, the City characterizes the Fifth Circuit's ruling as "rigid[ ]" (*id.* at 14) and, thus, apparently completely clear.

The City's contentions miss the main point: Both courts ruled that a video programming provider using common carrier transport was not a "cable operator" who was required to obtain a municipal franchise. Subtle differences between the paths to that key ruling taken by the two courts do not create a conflict. Moreover, the Seventh Circuit's construction of the "cable system" definition echoes the alternate ground for the District Court's decision in this case, and the City concedes that it is "unknown" what the Seventh Circuit would have decided if an affiliate of Ameritech, instead of ECI, had used Supertrunking in the same manner as ECI and SBVS (City's Petition 15).

There is clearly no conflict between the decisions of the Fifth Circuit and Seventh Circuit.

B. The Eighth Circuit's *City of Ames* decision

The second decision cited by the City is *City of Ames v. Heritage Communications*, 861 F.2d 185 (8th Cir. 1988). Petition at 15-16.

The facts pertinent to the construction of the "cable operator" definition in that case were, however, materially different from those in this case or in *City of Chicago.*

City of Ames involved a parent company — Heritage Communications, Inc. ("Heritage") — and two of its subsidiaries, Ames Cablevision (a cable provider with a franchise to provide cable service in Ames, Iowa) and a new subsidiary that Heritage created to serve students within the city at Iowa State University (the "ISU Subsidiary"). 861 F.2d at 186.

Heritage initially negotiated with the city over the facilities Ames Cablevision would need in city rights-of-way, co-signed for rental of space on city power poles, declared that it was responsible for Ames Cablevision's obligations, funded an election to obtain approval of the subsidiary's franchise, negotiated changes in cable regulations with the city, and accepted the franchise after it was granted. *Id.* at 187. On these facts, the magistrate before whom the case was tried "found that throughout Ames Cablevision's solicitation and use of the franchise, Heritage acted on Ames Cablevision's behalf and Heritage acted as if the franchise belonged to itself, the parent." *Id.* at 186.

Subsequently, Heritage created and then acted as the agent for its new ISU Subsidiary, negotiating an agreement with the university allowing the ISU Subsidiary to provide cable service to student residence halls. *Id.* at 187. The ISU Subsidiary then went into business, sharing headend office space with Ames Cablevision and using Ames Cablevision's facilities to transport video traffic through city rights-of-way to the university dormitories. *Id.* at 187-88. Finally, "*Heritage* proceeded to inform the City that it would not pay franchise fees for [the ISU Subsidiary's] service." *Id.* at 188 (emphasis added).

The city sued the two subsidiaries *and* their parent, Heritage, contending that the city was entitled to assess franchise fees on the service of the ISU Subsidiary. *Id.* at 186.

Under these facts, "[t]he magistrate decided that [Heritage and its two subsidiaries] were operating a single cable system within the meaning of the [Cable] Act," and the District Court held that the city could collect franchise fees. *Id.* at 187. The Eighth Circuit affirmed, stating "we cannot say the magistrate's decision was clearly erroneous." *Id.* at 188.

The City's truncated presentation of *City of Ames* points out only that "[t]he franchised and unfranchised cable providers were affiliates of one another [as] subsidiaries of the same parent company." Petition at 16. Little else about *City of Ames* resembles the facts of this case, however.

The differences between these cases are both manifold and material.

The transport facilities operated by the Heritage companies functioned as a completely closed transmission path. Neither Heritage nor either of its subsidiaries was a common carrier obliged to offer signal transport service to any customer. In contrast, SBVS obtained from Bell Telephone only the same services, at the same prices, that any other similarly situated customer could obtain. In addition, cable franchise fees represented the *only* source of city revenue for the use of municipal rights-of-way by Heritage's ISU Subsidiary, while the City of Austin separately assesses fees on Bell Telephone's Title II telecommunications facilities in the City, whether they are used to transmit voice, data or other forms of traffic.

Further, there was no evidence in this record showing the sort of alter ego relationship that existed among the Heritage companies, or suggesting that SBVS' parent corporation ever acted on behalf of SBVS or Bell Telephone in their dealings with the City. Instead, as the Fifth Circuit noted, the evidence before the District Court, to which the City stipulated, delineated clear boundaries between SBVS and Bell Telephone. App. 6; *see also* App. 14-17 (District Court Order).[9]

In sum, *City of Ames* represents a decision driven by the particular interrelationships of the three Heritage companies. Nothing about it conflicts with the decisions of other courts evaluating materially different facts.

C. These decisions do not present any conflict

In its discussion of *City of Ames*, the City recognizes that "the [Eighth Circuit] reviewed the factual details of the activities and relationships of the parent company and its subsidiaries." Petition at 16. Given the provision at issue in that case — the "cable operator" definition on which the City itself relied in this case — an inquiry into the precise relationship of the video programming provider and the signal transport provider is appropriate. The Eighth, Seventh and Fifth Circuit decisions all embody such an inquiry, and each decision reflects the particular facts of the particular case before each court.

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9. The City of Austin elected to present a case based on the theory that common ownership necessarily meant that a video provider subsidiary was a "cable operator." The City did not bring suit against Bell Telephone or SBC Communications Inc. Further, although the City was free to develop any factual record it deemed necessary for its case, it submitted the case for decision with these parties and on this record.

These decisions do not present a conflict. Instead, they present fact-based decisions that differ because the facts of each case were different. Fact-bound disputes of this sort do not merit Supreme Court review.

D. A ruling on the atypical facts presented by this case would have only limited precedential importance

The City's Petition challenges a service arrangement and a relationship of service providers that is not presented by any other case and, indeed, that is in fact no longer in existence even with respect to SBVS at present. The sole lingering dispute the City asks this Court to resolve, over a relatively minuscule amount of franchise fees, does not create a certworthy case. Furthermore, the Petition offers, at best, only speculations that this issue might arise again in the future and that a decision by the Supreme Court might have prospective importance.

In the absence of any genuine conflict and of any pressing need, residual concerns about affiliation and ownership issues arising under the "cable operator" definition in 47 U.S.C. § 522(5) can be addressed by the FCC — an administrative remedy shown to be available by *In re ECI* — and by allowing the issue to be considered among the circuits, if it arises again. Indeed, the City notes that parties to the *City of Chicago* decision have requested further review by the Seventh Circuit. Petition 13 n.4.

For all of these reasons, this case is not one that merits review by this Court through a writ of certiorari.

II.

THE FIFTH CIRCUIT'S JUDGMENT SHOULD NOT BE REVIEWED BECAUSE IT IS ENTIRELY CORRECT.

The Cable Act defines a "cable operator" as

> any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

47 U.S.C. § 522(5).

The Fifth Circuit examined the facts and ruled that, even if the Bell Telephone facilities and all of the SBVS equipment were considered collectively to be a "cable system," SBVS' satellite dishes, tower, antennae and headend did not constitute the requisite "significant interest" in the aggregated facilities and did not place SBVS in the role of controlling a cable system. App. 5.

On a record showing that SBVS neither owned nor controlled the facilities that were provided by Bell Telephone, this was a straightforward reading of the statute. Moreover, the Fifth Circuit's analysis and decision stands squarely between the decisions of the Seventh Circuit and Eighth Circuit. The *City of Chicago* decision concludes that no cable operator (or cable system) exists on parallel facts where there is no affiliate relationship between the video provider and transport provider. At the other end of the

spectrum, the *City of Ames* decision held that a corporation, there Heritage, could not evade franchise requirements by operating through alter ego subsidiaries in a way that created only a sham division of ownership and control over facilities that clearly used city rights-of-way and that were not open, common carrier systems. The Fifth Circuit addressed a factual situation between those two extremes, and defined another point on the factual continuum where a particular ownership and control relationship does not trigger the cable operator definition.

Furthermore, although the City quarrels with the reasoning and conclusion of the Fifth Circuit majority, the City completely ignores the alternative ground for the District Court's ruling in favor of SBVS — the private cable exception excluding from the definition of "cable system" a service that is provided "without using any public right-of-way." 47 U.S.C. § 522(7)(B). As the District Court pointed out, the FCC's reasonable construction of a statute it is charged with enforcing merits due deference (Order, App. 22-23), and the FCC's *In re ECI* decision concluded that this exception applied to an analogous service arrangement (Order, App. 23-26). The Fifth Circuit did not reach this issue, but neither the majority opinion nor the dissenting opinion questioned this ruling.

The City thus seeks review where the judgment below is correct and where, in any event, a ruling on the "affiliation" and "ownership" issues that are now raised by the City would not change the alternative basis for judgment in favor of SBVS and against the City. Indeed, the City not only has failed to challenge this alternative basis for the District Court's judgment, it has not raised *any* question related to that ruling in its Petition.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

JOHN J. MCKETTA, III
Counsel of Record
MICHAEL DIEHL
EDWARD STEVENS MCHORSE
GRAVES, DOUGHERTY, HEARON
& MOODY, P.C.
Attorneys for Respondent
515 Congress, Suite 2300
Austin, Texas 78701
(512) 480-5600

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No. 99-1368

In the
SUPREME COURT OF THE UNITED STATES

CITY OF AUSTIN, TEXAS,
Petitioner,

v.

SOUTHWESTERN BELL VIDEO SERVICES, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF LOCAL GOVERNMENTS FOR LEAVE TO FILE AND BRIEF AMICI CURIÆ IN SUPPORT OF CITY OF AUSTIN's PETITION FOR WRIT OF CERTIORARI

William Malone
(Counsel of Record)
Nicholas Miller
Miller & Van Eaton, PLLC
1155 Connecticut Ave., #1000
Washington, D.C. 20036-4306
(202) 785-0600

Counsel for Amici Curiæ

March 2000

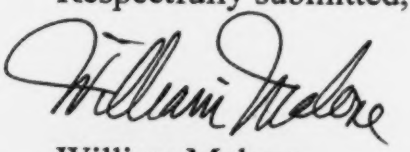
24pp

MOTION OF LOCAL GOVERNMENTS TO FILE BRIEF AMICI IN SUPPORT OF CITY OF AUSTIN's PETITION FOR WRIT OF CERTIORARI

The National Association of Telecommunications Officers and Advisors (NATOA), the Texas Coalition of Cities For Utility Issues (TCCFUI), and the Michigan Coalition to Protect Public Rights-of-Way (PROTEC) move for leave to file the accompanying brief amici curiæ in support of the City of Austin's petition for writ of certiorari.

Counsel for the City has consented. Counsel for the Respondent company has withheld consent. The Cable Act of 1984, as amended, 47 U.S.C., Title 5, Subchapter V-A, relies on local franchising authorities in significant respects to regulate cable television. Section 621(b) of the Act, 47 U.S.C. § 541(b), at issue here, is part of the Congressional scheme focussed on implementation of intergovernmental regulation. The amici are associations representing franchising authorities as defined in Section 602(10) of the Act, 47 U.S.C. § 522(10). The brief amici being tendered herewith argues the Section 621(b) issue from a perspective broader than plain meaning.

Respectfully submitted,



William Malone
(Counsel of Record)

Nicholas Miller
Miller & Van Eaton, PLLC
1155 Connecticut Ave., #1000
Washington, D.C. 20036-4306
(202) 785-0600

Counsel for Amici National Association of Telecommunications Officers and Advisors (NATOA), the Texas Coalition of Cities For Utility Issues (TCCFUI), and the Michigan Coalition to Protect Public Rights-of-Way (PROTEC)

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INTERESTS OF AMICI[1]

Amici are associations of cities and other local governmental and inter-governmental units and of officials thereof.[2] These local governments are the franchising authorities[3] that issue to cable operators under state laws the cable franchises that Section 621(b) of the Cable Act, 47 U.S.C. § 541(b), requires cable operators to have before they can provide cable service. These local governments implement in whole or in part, under the guidelines of the Cable Act, Sections 611 (Cable Channels for Public, Educational, or Governmental Use) and 612 (Cable Channels for Commercial Use), Sections 621-27 of Part III (Franchising and Regulation), Section 631 (Protection of Subscriber Privacy), and Section 632 (Consumer Protection and Customer Service), 47 U.S.C. §§ 521, 522, 541-47, 551-552. This franchising authority is preserved from federal preemption as provided in Section 636 (Coordination of Federal, State, and Local Authority) and 637 (Existing Franchises), 47 U.S.C. §§ 556, 557. See also, City of Dallas v. FCC, 165 F.3d 341, 347 (5th Cir. 1999), limiting the federal agency's

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[1] The written consent of Petitioner to the filing of this brief amici has been filed with the Clerk of this Court.

[2] No part of this brief was authored in whole or in part by a counsel for either party, and no person or entity, other than the *amici curiæ*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Petitioner City of Austin is a fiscal agent to TCCFUI, one of the amici.

[3] "[T]he term 'franchising authority' means any governmental entity empowered by Federal, State or local law to grant a franchise." Section 602(10) of the Cable Act, 47 U.S.C. § 522(10).

invasion of local authority under Section 601(c)(1) of the Telecommunications Act of 1996, 47 U.S.C. § 152 nt.

Amici are the National Association of Telecommunications Officers and Advisors (NATOA), the Texas Coalition of Cities For Utility Issues (TCCFUI), and the Michigan Coalition to Protect Public Rights of Way (PROTEC). Amici here are among those amici curiæ who filed a brief amici curiæ in support of the City of Austin in the Fifth Circuit.

QUESTIONS PRESENTED

Where Congress made regulation of cable television under the Cable Act applicable only to *cable operators* and defined *cable operators* as persons and their affiliates who provide *cable service* over a *cable system*, and

Where the Respondent indisputably offered *cable service* to the public; the District Judge found that the Respondent "appears in all functional respects to be a *cable operator*;" and the video signals were selected by Respondent at its cable headend and were carried transparently over transmission facilities owned by its corporate affiliate and located within the public rights-of-way to its in-building cable distribution facilities for delivery to its cable subscribers as described in the statutory definition of *cable system* --

(1) Whether this Court should review the Fifth Circuit majority's conclusion that Respondent was not a *cable operator*, where that finding would have the effects of

> (i) wholly exempting from regulation under the Cable Act an operator's provision of cable services by reason of its parent's electing to divide up ownership of the cable system among affiliated entities, and
>
> (ii) radically diminishing the local governments' rôle in the regulation of cable television that Congress sought to preserve in the Cable Act; and

(2) Whether the majority's disregard of the express limitations the Federal Communications Commission placed on application of the Act to such systems in a contemporaneous collateral proceeding violates this Court's Chevron doctrine and the doctrine of separation of powers embodied in the U.S. Constitution.

STATUTES INVOLVED

This case involves interpretation and application of the Cable Act of 1984, as amended, which is Title VI of the Communications Act of 1934 and is codified as 47 U.S.C., Ch. 5, Subchapter V-A. The directly relevant statutory provisions are printed in the appendix to the petition at App. 36-37.

SUMMARY OF THE ARGUMENT

The courts below erred in holding that Respondent SWBV, the operator of a video distribution system that was indisputably offering "cable service" to subscribers in dispersed apartment houses, was not a "cable operator" within the definition in Section 602(5)(A) of the Cable Act, 47 U.S.C. § 522(5)(A). App. 4 n.6. The courts reached this conclusion notwithstanding the district court's having found that SWBV appears "in all functional respects to be a cable operator." App. 27.

In holding that SWBV was not a cable operator because it did not own the totality of its video distribution system, the courts below seized on the fact the cable connecting SWBV's "headend" with its distribution facilities located within the apartment houses was not owned directly by SWBV, but instead was owned by SWBT, its affiliated local telephone company. The Fifth Circuit failed to give effect to the key phrase in the statutory definition of cable operator, viz.:

> a 'cable operator' means any person ... (A) who provides cable service over a cable system and directly *or through one or more affiliates* owns a *significant interest* in such cable system....

(emphasis supplied). Because SWBT was undeniably an affiliate of SWBV within the meaning of Section 602(2)(affiliate), 47 U.S.C. § 522(2), the Fifth Circuit should have imputed SWBT's ownership of the

connecting cable emplaced in city streets to SWBV. Thus, SWBV would have owned not only the significant interest in the cable system required by Section 602(5)(A) but by imputation the entire cable system as well. App. 4 nn.6-7.

The majority failed to consider the impact of its definitional holding in the context of Section 621(b), 47 U.S.C. § 541(b), on the administration of the Act as a whole. Because the Cable Act regulates only cable service provided by "cable operators," the unavoidable collateral effect of the majority's holding that SWBV was not a cable operator was to totally exempt SWBV's cable service from regulation under the Cable Act. The majority also failed to consider the relationship between its rationale and that applied by the Federal Communications Commission in its contemporaneous 4-1 decision in Entertainment Communications, Inc., 13 F.C.C. Rcd 14277, 12 P&F C.R. 800 (1998) ("ECI"), now pending before the Seventh Circuit on rehearing. The ECI case involved a system similarly configured to SWBV's, except that the cable connecting ECI's cable headend to its distribution facilities in dispersed apartment houses was owned by an unaffiliated telephone company. The Commission expressly placed its holding that ECI was not a cable operator on the condition that "there is absolute separation of ownership between ECI and Ameritech and there is nothing more than the carrier-user relationship between them...." Id. at 14311, 12 P&F C.R. at 821. The District Court disregarded this limitation, and the majority opinion ignored it.

The decisions of the courts below proceeded from a cramped construction of the statutory language, and the majority failed to properly consider the policy determinations implicit in its holding that had been recognized in the decision of the federal agency. While in the end the courts below could properly have found the plain language of the statute to override agency policy, the narrow focus of the majority's opinion below — excluding the agency's policy pronouncement — did not even consider the degree of judicial deference appropriately due agency policy under Chevron[4] and the constitutional separation of powers.

ARGUMENT

In 1984 Congress adopted a carefully balanced legislative scheme for regulation of the delivery of cable services to the public. According to the majority opinion below, a corporate provider of cable services may evade that scheme by apportioning ownership of its cable system among its affiliates. An apprehension of such a result underlies the FCC majority's imposition of seven conditions on its ruling in the similar ECI case – an apprehension that was made more explicit in the thoughtful dissenting opinion of Commissioner Tristani. The majority below adverted to neither opinion at the agency level. Because the opinion in the court below opens the way to wholesale evasion of the Congress' "national policy," resulting in

[4] Chevron v. NRDC, 467 U.S. 837 (1984).

destabilization of the comprehensive statutory plan for the regulation of the cable industry, it is important that this Court review the determination of the Court of Appeals.

I. The Majority's Decision is Unfaithful to Congress' Language and Intent.

The majority's decision holding that Respondent SWBV was not required to have a local cable franchise under Section 621(b) of the Cable Act, 47 U.S.C. § 541(b), because SWBV was not a "cable operator," fails to accurately give effect to either the language or the intent of the definition in Section 602(5)(A) of the Act, 47 U.S.C. § 522(5)(A).

1. The Courts' Construction of Section 602(5) Contradicts the Regulatory Purpose of the Act as a Whole.

The Act "establishes a national policy that clarifies the current system of local, state and Federal regulation of cable television. This policy continues reliance on the local franchising process as the primary means of cable television regulation...." H.R. Rep. No. 98-934 to accompany H.R. 4103 at 19 (1984). This purpose is reflected in subsections (1)-(3) of Section 601 (Purpose) of the Act, 47 U.S.C. § 521. Because the Cable Act regulates only cable service provided by "cable operators," the unavoidable collateral effect of the majority's construction of the statutory definitions in Section 602(2) and (5)(A) of the Act, 47 U.S.C. § 522(2) and (5)(A), is to invite a whole class of

providers of cable services to exempt themselves from all regulation under the Cable Act by purposefully reconfiguring their respective systems.

The Act conditions a cable operator's carriage of programs from licensed television broadcast stations on the operator's having obtained a local franchise in Section 621(b), 47 U.S.C. § 541(b). But that is just one of many consequences of the system operator's falling within the definition of a "cable operator" in Section 602(5), 47 U.S.C. § 522(5). The Federal Communications Commission, in its contemporaneous collateral decision in Entertainment Connections, Inc.[5] enumerated pervasive "consequences under the Communications Act and the Commission's rules" additional to the local franchising requirement at issue there and in the instant case. The majority's decision fails to reconcile its unnatural reading of the statutory definition with the structure and purpose of the Cable Act as a whole to regulate provision of cable services to the public.

2. The Courts' Cramped Construction of Section 602(5) Fails to Effect Congress' Intent to Inclusively Regulate Cable Service.

Because Congress intended the Act to protect all consumers of cable service, it drafted the Act's definition of "cable operator" to be broadly inclusive,

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[5] 13 F.C.C. Rcd 14277, 14278 & n.6, 12 P&F C.R. 800, 801 & n.6 (1998) ("ECI"), now pending before the Seventh Circuit on rehearing of its decision in City of Chicago v. FCC, 199 F.3d 424 (7th Cir. 1999).

rather than crampingly narrow. Congress intended the Cable Act to establish a national framework for the evolving "cable industry" generally, H.R. Rep. No. 98-934 at 20, and "a national policy to guide the development of cable television" and to "encourage the growth and development of cable systems." Id. at 40. This intent is apparent in Congress' drafting of the two pivotal definitions in Section 602 (Definitions) of the Act, 47 U.S.C. § 522. The majority opinion below imports some common law concept of ownership (App. 5 n.8; cf. dissent, id. at 9 n.3), but the plain language of the pertinent statutory definitions compels the inclusion of sister subsidiaries, such as SWBV and SWBT here, which are under common ownership and control. App. 4 n.6. Congress said in Section 602 that

> For the purposes of this title [VI] –
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> * * *
>
> (5) the term "cable operator" means any person *or group of persons* (A) who provides *cable service* over a *cable system* and directly *or through one or more affiliates* owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system;
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> * * *

(emphasis supplied). In turn Congress defined

> (2) the term "affiliate", when used in relation to any person, [to mean]

> another person who owns or controls, is owned or controlled by, *or is under common ownership and control with*, such person;
>
> * * *

(emphasis supplied).

It is difficult to imagine a more inclusive definition of cable operator than Congress employed. That definition reaches operators providing cable service directly or through an affiliate. While the majority opinion below seemed to think that the "affiliate" portion of the definition reached provision of cable service only through subsidiaries and not sister subsidiaries, App. 5 n.8, the last phrase in Section 602(2)'s definition of *affiliate* "another person ... under common ownership or control with[] such person" unmistakably includes sister subsidiaries under common ownership and control.

Certainly Congress intended to place under regulation a system configured as SWBV had elected to configure its system. There is no evidence in the text or legislative history of the Act that Congress intended to permit a cable operator to evade the Cable Act by inserting a passive section of transmission line between the operative ends of his video distribution system. Most certainly, Congress did not intend that this exemption could be obtained, as here, by the corporate parent's election to have such a section constructed by a sister subsidiary. The Federal Communications Commission's decision and Commissioner Tristani's dissent in ECI recognized the threat to

the regulation of cable service posed by cable operators' electing to transfer segments of their respective transmission systems to separate corporate entities. ECI, supra, at 14311 and 14318, 12 P&F C.R. at 821, 824.

The structure of Section 602 (definitions) is further evidence that Congress did not intend to place exemptions based on system configuration in the definition of "cable operator." SWBV's system clearly falls within the general definition of "cable system" in subsection (7) ("a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service ... to multiple subscribers within a community..."). Congress placed in the lettered paragraphs of subsection (7) exemptions based on system ownership, use, and configuration. See H.R. Rep. No. 98-934 at 44 ("There are four specific exemptions to the term 'cable system'...."). None suggests that one person must own all the facilities that constitute a "system." Subsection (5) in contrast addresses the question of *who* is the operator of the system. The majority's intimation that the holding company might be the cable *operator* here, App. 6 n.9, strains against the connotations of "operator" and would introduce an unnecessary complication into effective regulation of cable services on both the federal and local levels.

There is no dispute that SWBV provides *cable services* to the public. App. 4 n.6. Congress, however, structured the Cable Act so that all federal regulation of the provision of cable services is achieved through

the regulation of "cable operators." It is plain from the statutory definition that Congress intended to sweep within the regulatory ambit of the Cable Act all substantial providers of cable services. The majority's construction of Section 602(2) and (5) frustrates this Congressional intent.

3. The Courts' Exemption of Such Systems Undercuts Local Regulation.

Finally, the majority's crabbed construction of Section 621(b), 47 U.S.C. § 541(b), that exempted SWBV from the federal requirement to obtain a local franchise for cable services, was inconsistent with the statutory scheme of the 1984 Cable Act reflected in Section 601 (Purposes) of the Act, 47 U.S.C. § 521, and its legislative history. Subsections (1) and (3) demonstrate that Congress wrote comprehensively to "establish a national policy concerning cable communications" and to "establish guidelines for the exercise of Federal, State, and local authority" with respect thereto. "This policy continues reliance on the local franchising process as the primary means of cable television regulation...." H.R. Rep. No. 98-934 at 19. Cf. City of Dallas v. FCC, supra, at 348.

Section 621(b)'s requirement for a local franchise is critical to the efficacy of Congress' comprehensive scheme for cable regulation. Local franchises are integral to the operation of Sections 611 (Cable Channels for Public, Educational, or Governmental Use), 612 (Cable Channels for Commercial Use), 613 (Ownership Restrictions), 617 (Sales of Cable Systems), 621-27 (Part III-Franchising and

Regulations), 631 (Protection of Subscriber Privacy), 632 (Consumer Protection and Customer Service), 634 (Equal Employment Opportunity), 636 (Coördination of Federal, State, and Local Authority), and 637 (Existing Franchises), 47 U.S.C. § 521-23, 527, 541-47, 551-52, 554, 556-57.

III. THE MAJORITY'S DISREGARD OF THE AGENCY'S EXPRESSION OF LEGISLATIVE POLICY VIOLATES CHEVRON AND THE SEPARATION OF POWERS.

Amici concur with the City of Austin that the majority's construction of the term "cable operator" is inconsistent with the language of the carefully crafted definitions of the Act.

But, separately, the majority opinion has ignored the expression of a legislative policy embodied in paragraphs 3 and 73 of the Federal Communication Commission's order in ECI. In so doing, the majority violated the doctrine of separation of powers that assigns to the legislative branch the enunciation of policy, as distinguished from the judicial function of adjudication. The courts may not ignore expressions of legislative policy adopted by the agency, so long as that policy is within a valid delegation by Congress. To do so violates the doctrine of separation of powers which consigns the legislative function to branches of government other than the Article III courts. Cf. Mistretta v. U.S., 488 U.S. 361, 392 (1989) (recognizing limits on the courts' competency to make "political judgments").

As an independent agency, the FCC possesses some powers that are quasi-legislative and some that are quasi-judicial. E.g., Town of Deerfield, N.Y. v. FCC, 992 F.2d 420 (2d Cir. 1993). The Court need not pause here to consider whether the Commission's order in ECI – formally a declaratory ruling – is in form quasi-legislative or adjudicative, for it historically has been thought to be a virtue of the administrative process that the agency has the discretion to formulate future policy either by rule making or by adjudication. See NLRB v. Bell Aerospace Co., 416 U.S. 267, 291-95 (1974), citing the plurality opinion in NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969), and SEC v. Chenery Corp., 332 U.S. 194 (1947) (Chenery II). The ECI case involved a similarly configured system, except that the connecting cable under the streets was owned by the local telephone company, AMERITECH, which was unaffiliated with ECI. The Commission ruled that ECI was not a cable operator. Significantly, however, the Commission specifically limited its holding to the instance where "there is absolute separation of ownership between ECI and Ameritech and there is nothing more than the carrier-user relationship between them...." Id. at 14311, 12 P&F C.R. at 821 (¶ 73[i]). The clear implication is that the Commission would have ruled otherwise on the facts of the situation here, where SWBV and SWBT are sister subsidiaries.

To the extent that the ECI embodies the proper discharge of a policy-making rôle by the agency, the courts step out of their judicial rôle to reject or ignore a legislative policy within the agency's delegated

authority. Unlike the courts below, the Commission recognized that a decision on the question of whether ECI was a cable operator or not had ramifications beyond the issue of the applicability of the single section of the Act before the district court. Id. at 14311, 12 P&F C.R. at 801 (¶ 3 & n.6). The majority opinion below, by choosing to totally ignore the policy aspects of the agency decision implicitly moved from a judicial rôle to a legislative one.

Amici have argued to the Seventh Circuit that the agency reached the wrong result in ECI, and Amicus PROTEC has argued additionally that the Commission lacked jurisdiction to construe Section 621(b) under the line of deference cases running from NLRB v. Hearst Publications, 322 U.S. 111, 130 (1944), to Adams Fruit Co. v. Barrett, 494 U.S. 638, 649-50 (1990). Be that as it may, the district court's failure to reconcile its decision with the agency's express conditions, inserted to implement the Commission's view of the statutory policy, and the Fifth Circuit majority's total failure to consider the agency's policy were impermissible intrusions by omission into the policy-making area. While the courts below might in the end have determined that the Commissions' policy was foreclosed by the plain meaning of the statutory language or otherwise, the courts below were obliged at least to consider the appropriate degree of deference to be given the agency decision under Chevron, if any, and under the doctrine of separation of powers.

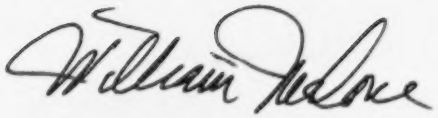
Moreover, the District Court's contradiction of the agency's non-affiliation limitation on its holding

reflects a judicial failure to respect the agency's potential policy-making rôle -- if not an impermissible collateral overruling of the agency's ruling and an invasion of the Seventh Circuit's exclusive jurisdiction on appeal therefrom under 28 U.S.C. § 2112 (Record on review and enforcement of agency orders), which consigns review of agency decisions under the Hobbs Act procedure, now 28 U.S.C. § 2346 (Certification of record on review), to a single court of appeals.

CONCLUSION

This case and the ECI case, taken together, present decisions with vigorous dissents within the Fifth and Seventh Circuits and in the Commission (4-1) and, in addition, inconsistencies between the Commission and the Fifth Circuit. The issues are obviously difficult ones. Prompt and authoritative resolution of those questions, Amici submit, is crucial to the continuing viability of federal and local regulation of cable television and "[to] provide[] the cable industry with the stability and certainty that are essential to its growth and development." H.R. Rep. No. 98-934 at 20.

Accordingly, the court should grant the City of Austin's ~~Dallas'~~ petition for certiorari but stay briefing on the merits pending the Seventh Circuit's disposition of the pending petitions for rehearing of its decision in City of Chicago v. FCC, 199 F.3d 424 (7th Cir. 1999).



William Malone
(Counsel of Record)
Nicholas Miller
Miller & Van Eaton, PLLC
1155 Connecticut Ave., #1000
Washington, D.C. 20036-4306
(202) 785-0600

Counsel for Amici Curiæ

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